Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

DILLARD DEPARTMENT STORES, INC. AND
DILLARD'S NEVADA, INC.,

Petitioners,

v.

DELORES BECKWITH,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a standard of review that upholds a punitive damages award against a corporate defendant unless the award, when compared to the defendant's "nationwide worth," would "financially destroy or annihilate" the defendant violates the constitutional requirements enunciated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

PARTIES INVOLVED AND RULE 29.6 STATEMENT

All parties below are named in the caption. Dillard Department Stores, Inc. is now incorporated under the name Dillard's, Inc., and has no parent company. Dillard's Nevada, Inc. is wholly owned by Dillard's, Inc. Prudential Insurance Company of America owns a 10.33 percent equity interest in Dillard's, Inc. Capital Research & Management Company owns a 10.3 percent equity interest in Dillard's, Inc. Dillard's, Inc. does not own more than 10% of any other publicly-traded company.

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Petitioners Dillard Department Stores, Inc. and Dillard's Nevada, Inc. (collectively "Dillard") respectfully petition this Court for a writ of certiorari to review a decision of the Supreme Court of Nevada.

OPINIONS AND ORDERS BELOW

The opinion of the Nevada Supreme Court (App., *infra*, 1a-12a), is reported at 989 P.2d 882. That court's order denying rehearing (*id.* at 20a) is not reported. The judgment and post-verdict order of the trial court (*id.* at 13a-19a) are not reported.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on December 13, 1999. That court denied rehearing on February 22, 2000. This petition is being timely filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment provides, in pertinent part, "[N]or shall any State deprive any person of . . . property, without due process of law." U.S. CONST. AMEND. XIV, § 1.

2. The Commerce Clause provides, in pertinent part: "The Congress shall have the Power . . . To regulate Commerce . . . among the several States." U.S. CONST. ART I, § 8, cl. 3.

STATEMENT OF THE CASE

This case demonstrates that, absent this Court's intervention, the misuse by many courts of corporate defendants' wealth to justify otherwise excessive, multimillion-dollar punitive exactions threatens to render the promise of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), entirely meaningless. The punitive damages trial in this case was in truth a trial about Dillard's size, wealth, and out-of-state residency. The record of that proceeding is permeated with emotional entreaties to the jury to punish—or, in the oft-repeated words of petitioner's counsel, "pound"—Dillard for its nationwide worth and its status as a large, out-of-state corporation. 9/29/99 Tr. 80, 84. Indeed, almost *half* of that record is dedicated to the number, style, and use by Dillard and its executives of corporate jets. *E.g.*, *id.* at 31-42, 52-57, 66-67. The remainder of the record is replete with lengthy and inflammatory argument concerning the value of Dillard's aggregate assets and net worth, and with a literal laundry list of numerous large, well-known companies that rank below Dillard on the "Fortune 500" ranking. *E.g.*, *id.* at 59-63.

Rather than provide a meaningful constraint on such biased and unchecked jury discretion as required by this Court's cases, the Nevada Supreme Court affirmed the trial court's $1.8 million punitive damages award based solely on Dillard's nationwide financial status, without *any* attempt to justify the award under the constitutional standards this Court annunciated in *BMW*. Most significantly, the court

below utterly ignored both this Court's refusal in *BMW* to include the defendant's wealth in the constitutional analysis and its strong admonition against extraterritorial punishment.

Indeed, the Nevada Supreme Court did not even cite or refer to this Court's *BMW* decision in upholding the punitive award, despite Dillard's repeated argument that the award violated *BMW*'s constitutional standards. *See* Appellant's Opening Br. 22-23; Appellant's Reply Br. 15-16. Instead, in direct contradiction of this Court's precedent, the Nevada Supreme Court held that, because of the "subjective" nature of punitive awards, no "workable standards" exist "by which to evaluate the propriety of such an award." App, *infra*, 9a-10a. The court therefore held that a reviewing court *must* uphold a punitive award "unless . . . the amount awarded by the jury would financially destroy or annihilate the defendant" when compared to its "nationwide worth." *Id.*

While the decision below is an egregious example of the way in which lower federal and state courts have failed to follow this Court's decision in *BMW*, it is by no means an isolated one. Although some courts have faithfully applied *BMW* by refusing to use the defendant's wealth to inflate or dictate the punishment, many others have taken the same misguided approach as the Nevada Supreme Court below, and have allowed the overall wealth of a corporate defendant to either defeat or avoid altogether *BMW*'s due process "guideposts," leading to arbitrary, unpredictable and irrational punishments and frustrating *BMW*'s command that States provide advance notice of the maximum penalty that may be imposed for particular conduct.

Certiorari should therefore be granted to resolve the conflicts and confusion among state and federal courts about the relevance of a corporate defendant's wealth and other financial status in the *BMW* framework, and to make clear that this Court's omission of such wealth considerations from the *BMW* guideposts was intentional. The Nevada Supreme Court's blatant refusal to follow *BMW*, or even to apply any meaningful review of punitive damages awards, provides an appropriate and compelling vehicle for the Court to decide these issues.

A. Factual Background

Respondent Deloris Beckwith was an employee of a Dillard's department store in Las Vegas, Nevada, where she worked as an area sales manager. In 1996, Beckwith suffered a work-related back injury and, thereafter, filed a claim for workers compensation. *See* App., *infra*, 2a. Because of her injury, Beckwith was temporarily rendered unable to work. *Id.* At the time of this injury, Beckwith had recently returned to work following an extended absence due to a non-work related injury to her knee. 1 AA 137-38.[1]

While Beckwith was home with her back injury, a Dillard store manager requested that Beckwith return to work—in light of the Dillard store's needs and Beckwith's previous absence from work. *See* App., *infra*, 2a. After Beckwith declined to return to work, Dillard hired another person to fill her position as sales manager of the Dillard store. *Id.* The store manager later informed Beckwith that she had been replaced as manager. *Id.*

Approximately one month after her back injury, Beckwith returned to work. App., *infra*, 2a. Because she had been replaced as area sales manager, Beckwith returned to work in an entry-level sales associate position, at a reduced salary. *Id.* Beckwith worked at this entry-level position for a short period of time before quitting. *Id.* After her departure from Dillard, Beckwith failed to obtain comparable employment. *Id.*

B. Trial Court Proceedings

1. On October 1, 1996, Beckwith filed suit against Dillard in the Eighth Judicial District Court of Nevada, asserting, *inter alia*, claims for tortious discharge and intentional infliction of emotional distress. Although not evident until the eve of trial, Beckwith's tortious discharge claim was premised on the theory that her discharge violated the public

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[1] Cites to "AA" refer to the Appellant's Appendix, submitted by Dillard on appeal to the Nevada Supreme Court.

policy contained in NEV. REV. STAT. § 616C.530, which describes a workers' compensation insurer's duties in returning injured employees to work, but which expressly precludes suits based on violations of those duties. *See* 1 AA 1, 113, 115, 125.

The liability phase of the bifurcated trial began on August 26, 1997. On September 15, 1997, Dillard moved for a directed verdict asserting, among other things, Beckwith's misstatement of the requirements of NEV. REV. STAT. § 616C.530. On the same date, the district court not only denied this motion, but also ruled as a matter of law that NEV. REV. STAT. § 616C.530 had been violated. 1 AA 234, 235. The next day, however, the Court withdrew this latter ruling. 1 AA 236-37.

On September 17, 1997, the jury returned a verdict against Dillard for $424,028.00 in compensatory damages on Beckwith's claim of tortious constructive discharge in violation of public policy and an additional $200,000.00 in compensatory damages on her claim of intentional infliction of emotional distress. 2 AA 338-39. The jury also ruled that Dillard was liable for punitive damages. 2 AA 339.

2. Prior to the commencement of the punitive damages phase of the trial, on September 23, 1997, Dillard filed a motion *in limine* to exclude, among other things, any evidence of Dillard's financial condition or net worth existing outside the state of Nevada, relying in part on this Court's decision in *BMW*.[2]

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[2] Dillard's previous motion *in limine*, filed on June 13, 1997, had sought, in part, to exclude all evidence of Dillard's financial condition or worth from the first phase of the trial. *See* 1 AA 86, 90. On September 3, 1997, the district court had granted in part and denied in part Dillard's motion, ruling that such financial evidence would be admissible if a "jury verdict comes in for punitive damages." 1 AA 174, 175.

Before the punitive damages trial began, on September 29, 1997, the Court denied Dillard's motion. 2 AA 340-41. The district court ruled that, in awarding punitive damages, the jury could consider the income and worth of not only the Dillard stores in Nevada, but also Dillard's nationwide holdings. 2 AA 341 (citing *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 763 P.2d 673 (1988)). The district court's ruling was based on Nevada's "financial annihilation" standard for assessing punitive damages awards. Under this standard, any award of punitive damages must be upheld unless it would "financially destroy or annihilate" the defendant. App., *infra*, at 10a.

The district court also refused Dillard's proposed jury instructions limiting the jury's consideration to Dillard's assets in Nevada. 2 AA 354-65. Prior to the punitive phase of the trial, Dillard had requested the following instruction:

> You may consider the Defendant's assets in the State of Nevada in determining the amount of punitive damages to award Plaintiff, however, the function of punitive damages is not served by an award which, in light of the Defendant's wealth and gravity of the particular act, exceeds the level necessary to properly punish and deter the Defendant.

2 AA 352. Dillard also requested the following instruction:

> In considering the amount of punitive damages, you should not consider out-of-state conduct and harm. Punitive damages cannot be based on Dillard's conduct outside the State of Nevada and its impact on non-residents. You should consider only the interest of the State of Nevada in protecting its own citizens.

2 AA 348. The district court, however, denied these proposals and instead instructed the jury:

> In considering Dillards' financial condition, you may consider its net worth, that is, its gross assets

> minus liabilities, actual and contingent. You may also consider its net income which means after tax income.

2 AA 363; *see also* 9/29/97 Tr. 20-23.

The punitive phase of the trial, which commenced on September 29, 1997, was marked by Beckwith's attorney's singular focus on Dillard's wealth and status as a large, out-of-state corporation. The only documentary evidence submitted by Beckwith was Dillard's annual reports and financial statements and the April 28, 1997 edition of the "Fortune 500." 9/29/97 Tr. 26.

The only witness called by Beckwith was Bernard Goldstein, the President of Dillard's Phoenix Division. Beckwith's questioning focused entirely on Dillard's size and wealth. Indeed, fully half of Beckwith's attorney's direct examination of Mr. Goldstein involved how many "corporate jets" Dillard owned, what they were like, and how they were used. 9/29/97 Tr. 31-36. Similarly, Beckwith's attorney's cross-examination of Dillard's only witness, Steven Kirk Nelson, focused on the number and types of "corporate jets" owned by Dillard and its executives. *Id.* at 52-54.

At closing argument, Beckwith's attorney's continued to focus entirely on Dillard's wealth, size, and status as an out-of-state corporation. The first half of the argument centered on Dillard's ranking in the "Fortune 500," and on informing the jury—over Dillard's objection—that Dillard was a larger company that Tyson Foods, Transamerica, Ralston Purina, Union Carbide, W.R. Grace, Quaker Oats, and numerous other large, well-known companies. 9/29/97 Tr. 59-63. Beckwith's attorney then turned to Dillard's financial statements, leading the jury through how many divisions Dillard had, where they were throughout the country, Dillard's sales, its profits, and general net worth. Throughout his argument, Beckwith's counsel repeatedly referred to Dillard and its assets as "huge," "enormous," and "giant." *E.g.*, *id.* at 63, 67. After belaboring the number of stores owned by Dillard in a variety of different States, for example, Beckwith's counsel

pronounced Dillard "a juggernaut on the sea of commerce. It is enormous. Its financial assets are huge." *Id.* at 63.

Beckwith's attorney returned again and again to the subject that was his focus throughout the earlier testimony: Dillard's "corporate jets." He gratuitously referred to William Dillard as "the 82 year old Chairman, who is flying all over the country, even to this day, still working on one of those big private jets" (9/29/97 Tr. 66), and he described the purported failure of Dillard's executives or board members to be in attendance at the trial:

> You can look in vein [sic] in this courtroom and you are not going to see one of these folks. That's their board of directors right there. You are not going to see a one of them. Where are they? Where are they? Can you tell me why they, with all of those corporate jets and the money to run them, didn't get one of these fellows or this lady here, Mr. Dillard's daughter, to come in and say, you know something, we were wrong and, Deloris, we're sorry to you and we apologize.

9/29/97 Tr. 67-68.

Beckwith's attorney then asked the jury to teach Dillard "an extremely strong lesson" and get the attention of Dillard's executives and lawyers who, according to Beckwith's attorney, were in Texas and Arkansas. 9/29/97 Tr. 69. He repeatedly pleaded with the jury to "pound" Dillard. *Id.* at 80, 84.

After only a few hours of deliberation, the jury returned a verdict against Dillard, imposing $2,800,000.00 in punitive damages for Beckwith's claim for tortious discharge and an additional $1,400,000.00 in punitive damages for Beckwith's claim of intentional infliction of emotional distress.

3. On October 9, 1997, Dillard filed a Motion for Judgment Notwithstanding the Verdict. 2 AA 366-455. Among other things, Dillard requested that the district court reduce the awards of punitive damages pursuant to NEV. REV. STAT. § 42.005, which limits punitive damages to three times compensatory damages where compensatory damages are $100,000 or more. *Id.* On October 30, 1997, the district

court granted Dillard's motion, to the extent that the court reduced the award of punitive damages pursuant to NEV. REV. STAT. § 45.005. 2 AA 459, 460. The district court upheld the jury's verdict in all other respects.

Accordingly, the ultimate awards of punitive damages were $1,272,084.00 on Beckwith's claim for tortious discharge (reduced from $2,800,000.00) and $600,000.00 on the emotional distress claim (reduced from $1,400,000.00). The district court also awarded Beckwith $518,455.00 in attorneys' fees, and $44,670.68 in taxable costs. 2 AA 466-68.

C. Nevada Supreme Court Proceedings

Dillard appealed to the Nevada Supreme Court arguing, *inter alia*, that the remaining punitive award was unconstitutionally excessive because it was predicated on Dillard's aggregate nationwide wealth and out-of-state activities. Appellant's Opening Br. 22-23. Specifically, Dillard contended that the plaintiff's repeated and improper reliance on Dillard's overall wealth and assets "inflam[ed] the jury" and violated *BMW*'s constitutional guarantees. *Id.* at 22.

On December 13, 1999, the Nevada Supreme Court issued its opinion affirming the trial court's judgment. In rejecting Dillard's arguments, the Nevada Supreme Court relied upon its previous, pre-*BMW* ruling in *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 593, 763 P.2d 673, 677 (1988) (holding that a defendant's wealth is "directly relevant to the size of [a punitive damage] award"). App., *infra*, 9a. In addition, the Nevada Supreme Court ruled that the punitive award was not excessive, because the award "will not financially destroy or annihilate Dillard." App., *infra*, 10a. In reaching this ruling, the Nevada Supreme Court did not cite this Court's *BMW* ruling. *Id.*

Dillard timely filed a petition for rehearing, which the Nevada Supreme Court denied on February 22, 2000. App., *infra*, 20a.

REASONS FOR GRANTING THE WRIT

The problem of arbitrary, capricious and grossly excessive punitive damages awards has not abated since this Court's decision in *BMW*. Massive punitive damages judg-

ments continue to be inflicted across the country in a broad spectrum of cases, especially in cases like this one involving large out-of-state corporate defendants that do business throughout the Nation. *See, e.g.*, *Anderson v. General Motors Corp.*, No. BC116926 (Cal. Super. Ct., Los Angeles County Aug. 26, 1999) ($4.8 billion punitive damages jury verdict in automobile design defect case subsequently reduced to $1.09 billion); *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548 (D.S.C. 1999) (upholding $250 million in punitive damages in automobile design defect case); *Romo v. Ford Motor Company*, No. 82318 (Cal. Super Ct., Stanislaus County July 12, 1999) ($290 million punitive damages verdict in automobile design defect case subsequently overturned on grounds of jury misconduct).

Many lower courts have continued to uphold such excessive awards on grounds that are entirely inconsistent with this Court's *BMW* decision. As this case demonstrates, for example, lower courts routinely evade the objective factors set forth in *BMW*, and instead rely on a factor rejected in *BMW*—the defendant's nationwide wealth, profits, and costs—as a basis for upholding huge punishments, thereby punishing the corporate defendant for its lawful conduct in other jurisdictions and nullifying any possibility of meaningful judicial review under the three *BMW* guideposts.

This Court's review is necessary to resolve the conflicts and confusion that have arisen since *BMW* on these issues, and to ensure that the *BMW* guideposts continue to have meaningful effect.

The Court Should Grant Certiorari To Make Clear That A Defendant's Aggregate Wealth And Financial Status Are Irrelevant To The Constitutional Factors Announced In *BMW*

A. The Decision Below Directly Conflicts With *BMW* And Other Decisions Of This Court

In *BMW*, this Court held that when a punitive damages award is "grossly excessive" in relationship to a State's "legitimate interests" in punishment and deterrence it "enter[s] the zone of arbitrariness that violates the Due Process Clause

of the Fourteenth Amendment." 517 U.S. at 568. The Court explained that a State has no legitimate interest in punishing conduct that took place outside the State's borders, that was "lawful where it occurred" and that "had no impact" on the State seeking to impose the punishment. *Id.* at 572-73. Under the federal due process inquiry into excessiveness, therefore, a punitive damages award must be analyzed without regard to such out-of-state conduct, "with consideration given only to the interests of [the citizens of the State seeking to impose the punishment], rather than those of the entire Nation." *Id.* at 574.

As part of its excessiveness analysis, the Court further announced that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. To determine whether a particular defendant had fair notice of the magnitude of the punitive award—and thereby to determine if the award is "grossly excessive"—this Court articulated "[t]hree guideposts": (1) the "degree of reprehensibility" of the defendant's conduct (*id.* at 575); (2) the ratio between the punitive damages award and "actual harm inflicted on the plaintiff" (*id.* at 580); and (3) the relationship between the punitive damages award and "the civil or criminal penalties that could be imposed for comparable misconduct" (*id.* at 583).

Notably, the respondent-plaintiff in *BMW* argued that the aggregate wealth of the petitioner-defendant should be part of the constitutional calculus and warranted upholding the $2 million award in that case under the Due Process Clause. *See* Br. of Respondent at 39, *BMW of North America v. Gore*, No. 94-896 ("The award is also constitutionally justified by reference to BMW's wealth. The evidence showed that even 'the $4 million judgment would not have a substantial impact' on BMW's financial position."). But this Court rejected that argument, declining to adopt the defendant's wealth as a due process guidepost and declaring: "The fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the

conduct of its business. Indeed, [a corporation's] status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on the interstate commerce." 517 U.S. at 585.

Justice Breyer, in his concurring opinion, added that, although Alabama permitted the courts to look to the "'financial position' of the defendant" as one of many factors in deciding whether an award was excessive under state law, "[t]his factor . . . is not necessarily intended to act as a significant *constraint* on punitive awards. Rather, *it provides an open-ended basis for inflating awards when the defendant is wealthy*." *Id.* at 591 (Breyer, J., concurring) (second emphasis added).

The decision below, by justifying the punitive award in this case based *solely* on Dillard's "nationwide worth," without any inquiry whatsoever into the necessary due process guideposts, is flatly inconsistent with *BMW*. The Nevada Supreme Court utterly disregarded the *BMW* analysis, despite Dillard's repeated arguments that the award violated the constitutional principles announced in *BMW*. Indeed, the Nevada Supreme Court eschewed *any* meaningful review of punitive damages awards:

> Heretofore, we have recognized the subjective nature of punitive damages and *the absence of workable standards by which to evaluate the propriety of such an award*. Accordingly, we have allowed that determination to rest with the discretion of the trier of the fact unless the evidence introduced at trial shows that the amount awarded by the jury would financially destroy or annihilate the defendant in which event we would attempt an appropriate adjustment of the award.

App., *infra*, 10a (emphasis added; citations omitted) (quoting *Hale v. Riverboat Casino, Inc.*, 100 Nev. 299, 306, 682 P.2d 190, 194 (1984)).

The Nevada Supreme Court's wholesale abdication of its constitutional responsibility to provide meaningful review of punitive damages awards flies in the face of this Court's cases. In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994),

for example, this Court held that precisely because "[p]unitive damages pose an acute danger of arbitrary deprivation of property"—a problem the Court warned was "aggravated" by the "rise of large, interstate and multinational corporations"—the decision as to the proper amount of punitive damages cannot constitutionally be "committed to the unreviewable discretion of the jury." *Id.* at 431-35; *see also TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 455 (1993) (rejecting standard of review for punitive awards under which "*any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities"); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring) (standard that merely tells jury to "take into account the character of the defendants, their financial standing, and the nature of their acts" in awarding punitive damages is "scarcely better than no guidance at all"); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring) ("the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits").

Similarly, this Court upheld Alabama's procedures for awarding and reviewing punitive awards in *Haslip* because Alabama's standard of review "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." 499 U.S. at 22. Among other things, the Court noted:

> The Alabama Supreme Court's postverdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of the defendant's wrongful gain, *the factfinder must be guided by more than the*

> *defendant's net worth.* Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Id. (emphasis added). As Justice Breyer observed in *BMW*, "legal standards need not be precise in order to satisfy this constitutional concern. But they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior." 517 U.S. at 588 (Breyer, J., concurring).

In direct contradiction to the plain command of these decisions, the Nevada Supreme Court determined that no "workable standard" exists by which to evaluate punitive damages awards, and that the issue is therefore left solely to the "unreviewable discretion of the jury," absent the very narrow—and in the case of large corporate defendants extremely rare—circumstances where the punitive award "would financially destroy or annihilate the defendant." App., *infra*, 10a. Thus, in contrast to Alabama's post-verdict review procedures upheld in *Haslip*, Nevada's "financial annihilation" standard is based *solely* on the defendant's net worth, and as a result, Nevada plaintiffs "enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." Such a blinkered and inequitable standard of review cannot satisfy this Court's requirement that States provide meaningful judicial review of punitive damages awards. As Justice O'Connor explained in *TXO*, upholding punitive damages awards where, as here, jury instructions, argument by counsel, and standards of appellate review "invit[e] the jury to redistribute wealth . . . based solely on [a large, corporate defendant's] financial position," 509 U.S. at 489-90, "renders the meaningful appellate review contemplated by *Haslip* [and now *BMW*] illusory" and allows courts "to disregard the post-trial review required by due process at whim or will." *Id.* at 500.

Moreover, the Nevada Supreme Court's "financial annihilation" standard does not even remotely comply with the constitutional analysis mandated by *BMW*. Because the decision below amounts to a wholesale disregard of federal constitutional principles, and places decisions of the Nevada

Supreme Court in stark conflict with this Court's decisions, this Court should grant certiorari. *See Hudson v. Louisiana*, 450 U.S. 40, 42 (1981) (conflict between decision of the highest state court and that of the Supreme Court on matter of federal law is ground for certiorari); *William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12, 14 (1974) (same).[3]

This Court's *BMW* decision mandates that all parties, including large corporations involved in interstate commerce, are entitled to "fair notice" and other guarantees of due process before a State imposes a substantial punitive damages award, even if the punishment "w[ould] not financially destroy or annihilate" the defendant. This Court's review is necessary to restore the due process guarantees that the State of Nevada now denies corporate defendants.

B. The Lower Courts Are In Conflict Regarding Whether The Defendant's Wealth May Be Considered Under *BMW*

Notwithstanding the *BMW* Court's rejection of wealth as a guidepost under the Due Process Clause, lower courts since *BMW* have frequently affirmed large punitive damages awards as constitutional based on the overall wealth of large corporate defendants. In affirming the trial court's judg-

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[3] NEV. REV. STAT. § 42.005(1)(a), which limits punitive awards to three times compensatory damages where compensatory damages are $100,000 or more, cannot excuse the Nevada Supreme Court's abdication of its constitutional responsibilities. The ratio between compensatory and punitive damages was only one of the due process guideposts announced in *BMW*, and the award in this case is unconstitutional for several reasons, including that it was based in large part on Dillard's lawful conduct in other states, that Dillard's conduct was not sufficiently reprehensible to warrant so great a punishment, and that nothing in Nevada law provided Dillard adequate notice that its conduct could result in so severe a punishment.

ment, the Nevada court below specifically stated: "We have previously allowed [reliance upon] nationwide worth when a jury decides punitive damages. Specifically, we have recognized '[t]he wealth of a defendant is directly relevant to the size of an award, which is meant to deter the defendant from repeating his misconduct as well as punish him for his past behavior.'" App., *infra*, 9a (quoting *Ainsworth*, 104 Nev. at 593, 763 P.2d at 677). Indeed, both the jury in awarding punitive damages in this case, and the Nevada Supreme Court in affirming the award, relied *entirely* on Dillard's "nationwide worth" and its status as a large, out-of-state corporation.

Other courts, unfortunately, have taken a similar approach, invoking the defendant's wealth to trump the constitutional analysis mandated by *BMW*. The Eighth Circuit, for example, upheld a $400,000 punitive damages award under *BMW* in part because "[t]he award of $400,000 is less than one one-thousandth of Southern Union's approximately $500,000,000 net worth." *Morse v. Southern Union Co.*, 174 F.3d 917, 925-26 (8th Cir.), *cert. denied*, 120 S. Ct. 29 (1999). In *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1338-39 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999), the Eleventh Circuit upheld a $4.35 million punitive damages award under *BMW*, in part because "[defendant] is a large and extremely wealthy international corporation."

In *Jimenez*, the federal district court upheld a $250 million punitive award under *BMW* against an auto manufacturer in light of evidence that the defendant "had a net worth exceeding $11.5 billion . . . , earned more than $13 billion in profits in the past three years . . . , earned profits of approximately $13 billion just on minivan sales from 1987 through 1995 . . . , and has $6.9 billion in cash on hand." 74 F. Supp. 2d at 578-79. The court concluded that under *BMW* the comparable civil penalties were to be scaled up by a factor of 50,000 to reflect "an average year's profits on minivan sales of approximately $1,500,000,000." *Id.* at 584.

In August 1999, a state trial court in California upheld $1.09 *billion* in punitive damages (reducing the jury's $4.8 billion verdict) against an auto manufacturer under *BMW*,

explicitly based on the defendant's wealth. The court held: "[T]he fair notice requirement has been satisfied under the particular facts of this case .... [D]efendant possessed information of its financial condition, putting it on notice that it might face an award as large as the one in this action." L. 1 at 2-3 (*Anderson v. General Motors Corp.*, No. BC116926 (Cal. Super. Ct., Los Angeles County Aug. 26, 1999)).[4]

Additional examples of this utter frustration of *BMW* through reliance on the defendant's wealth are legion in the federal courts.[5]

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[4] Twelve copies of all documents with "L." cites have been lodged with the Office of the Clerk of the Court.

[5] *See, e.g., Deters v. Equifax Credit Info. Services, Inc.*, 202 F.3d 1262, 1273 (10th Cir. 2000) (wealth is a relevant consideration in determining the size of a punitive damages award); *Greenbaum v. Svenska Handelsbanken*, N.Y., 67 F. Supp. 2d 228, 272 (S.D.N.Y. 1999) (purporting to apply BMW in upholding $1.25 million punitive damages award in light of defendant's stipulated ability to pay the award, observing that "[t]his stipulation qualifies [defendant] for the very highest punitive damages awardable for conduct of its flagrancy"); *Scribner v. Waffle House, Inc.*, 14 F. Supp. 2d 873, 940-46 (N.D. Tex. 1998) (imposing $7.45 million punitive damages award following bench trial, treating "the size of Waffle House" as a separate factor under BMW and observing that Waffle House "had total revenues of $283 million from its company-operated restaurants in the last fiscal year before trial, and the total revenue of its additional 465 'franchise restaurants' was $187 million during the same period. Also, the net income of Waffle House for the last fiscal year before trial was approximately $12 million."), *vacated upon stipulation of parties*, 62 F. Supp. 2d 1186 (N.D. Tex. 1999); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1253 & n.14 (S.D. Fla. 1997) (imposing $137.7 million punitive damages award following bench trial and citing *BMW* as

[Footnote continued on next page]

Other state courts have also been engaging in the same misuse of wealth as a proxy for a proper analysis of constitutional excessiveness under *BMW*. For example, in *Lakin v. Senco Prods., Inc.*, 987 P.2d 463 (Or. 1999), the Oregon Supreme Court upheld a $4 million punitive damages judgment based in part on the wealth of the defendant. Although the court purported to analyze the excessiveness issue under *BMW*, the analysis addressed only the factors enumerated in the state statute authorizing punitive damages, which included "the financial condition of the defendant." Relying on the reasoning of the Oregon Court of Appeals, which observed that "the defendant had a net liquidation value of $82,076,000" and that the award "equals approximately five percent of defendant's net value," the court held that the

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[Footnote continued from previous page]
guidance regarding due process limits, but relying on wealth to establish award: "The record reflects that each MiG [military aircraft] is worth approximately $45 million, and that the Cuban Air Force owns approximately 102 MiGs. The total value of this fleet, which is undoubtedly only a fraction of the Cuban Air Force's total assets, is therefore approximately $4.59 billion. The Court finds that 1% of this total, or $45.9 million, should be assessed against the Cuban Air Force for each of the killings."); *T.B. Proprietary Corp. v. Sposato Builders, Inc.*, 41 U.S.P.Q. 2d 1120 (E.D. Pa. 1996) (upholding $675,000 punitive damages award under *BMW*, noting that "[a] corporate defendant's net worth may be considered in determining the excessiveness of the amount of punitive damages awarded" and that "Toll's gross revenues in 1994 were over $500 million"), *aff'd*, 135 F.3d 766 (3d Cir. 1997); *Wood v. Allstate Ins. Co.*, 1997 WL 602796 (E.D. Pa. Sept. 19, 1997) (upholding $150,000 punitive award with only cursory discussion of BMW because "[t]he Third Circuit has endorsed a ratio of around one percent of a defendant's net worth for a punitive damage award," and the award was "well within the acceptable range" when compared to defendant's worldwide net worth of $13.2 billion) (citing *Dunn v. HOVIC*, 1 F.3d 1371, 1383 (3d Cir. 1993)).

award was not "unconstitutionally excessive." *Id.* at 475-76 (citing *Lakin v. Senco Prods., Inc.*, 144 Or. App. 52, 76-77 (1996)). *See also, e.g., Paracelsus Health Care Corp. v. Willard*, __ So. 2d __, 1999 WL 1000697 (Miss. Nov. 4, 1999), *petition for cert. filed* (Apr. 26, 2000) (No. 99-1719) (upholding award of punitive damages 150 times the size of the compensatory award, noting that, given the defendant's financial condition, the award would not impose "financial hardship"); *Wightman v. Consolidated Rail Corp.*, 715 N.E.2d 546 (Ohio 1999) (affirming award of punitive damages 6,250 times size of compensatory award in part because of defendant's status as a large corporation); *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483 (Fla. 1999) (affirming punitive award more than 15 times greater than compensatory award, in light of Owens-Corning's net worth); *Sierra Club Found. v. Graham*, 72 Cal. App. 4th 1135, 1162, 85 Cal. Rptr. 2d 726, 743 (Cal. Ct. App.) (upholding $2.02 million punitive award where defendant's net worth was $90 million, noting that "the award was more than 2 percent of [defendant's] net worth, far less than the 10 percent cap generally recognized by our courts" and opining that "[t]he *BMW* guidelines are just that—they are guidelines which, if not exactly replicated in a state scheme, do not spell constitutional doom"), *review denied* (Cal. Sept. 29, 1999); *Axen v. American Home Prods. Corp.*, 974 P.2d 224, 241-43 (Or. Ct. App.) (upholding $20 million punitive award purportedly under *BMW*, observing that "[t]here is evidence that AHP's annual profits are such that a smaller award may simply be absorbed as a cost of doing business"), *review denied*, 329 Or. 357, *cert. denied*, 120 S. Ct. 979 (2000).

This approach plainly contradicts *BMW* and conflicts with the approach taken by the other courts that have addressed the wealth issue since *BMW*. These cases generally recognize that a defendant's wealth cannot justify upholding a punitive damages award that is deemed "grossly excessive" when analyzed pursuant to the *BMW* principles and guideposts. *See, e.g., Continental Trend Resources, Inc. v. OXY USA*, 101 F.3d 634, 641 (10th Cir. 1996) ("From the [*BMW*] Court's statements we conclude that a large punitive award against a large corporate defendant may not be upheld on the

basis that it is only one percent of its net worth or a week's corporate profits.").

Numerous other courts have likewise rejected the notion that wealth can sustain a punishment otherwise deemed excessive under *BMW*. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 n.16 (8th Cir. 1995) (retired Justice White, sitting by designation) ("a defendant's wealth cannot alone justify a large punitive damages award"); *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 223 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation) (holding evidence of a defendant's wealth inadmissible under federal law to establish the proper amount of punitive damages in part because, "even when considering punitive damages based on state law, the Supreme Court did not treat the defendant's wealth as relevant" in *BMW*); *Florez v. Delbovo*, 939 F. Supp. 1341, 1348 (N.D. Ill. 1996) ("[I]t is clear that [defendant's] wealth cannot save a punishment that is deemed to be excessive under the *BMW* approach"); *Utah Foam Prods. Co. v. Upjohn Co.*, 930 F. Supp. 513, 531 (D. Utah 1996) ("Manifestly, wealth alone does not justify imposition of a disproportionately large punitive damage award"); *Parrott v. Carr Chevrolet, Inc.*, 965 P.2d 440, 454 (Or. Ct. App. 1998) ("[A]lthough the wealth of a defendant is a relevant inquiry on the issue of punitive damages, it is not a necessary element, and whether a defendant is financially able to pay an award does not mandate that it should do so") (citations omitted); *VF Corp. v. Wrexham Aviation Corp.*, 686 A.2d 647, 650 (Md. Ct. Spec. App. 1996) ("[A] defendant's wealth cannot be the principal basis for a punitive damage award"), *rev'd on other grounds*, 715 A.2d 188 (Md. 1998).

This disagreement concerning the use of wealth under *BMW* is intolerable and, in and of itself, frustrates *BMW*'s basic principle that citizens are entitled to advance notice of the size of potential monetary punishments.

C. The Wealth Issue Is Important, Substantial, And Recurring

This Court should grant certiorari in this case to make clear that the defendant's nationwide wealth is utterly irrelevant to the *BMW* inquiry. This issue is important and sub-

stantial, recurs frequently, and plainly warrants the Court's review in this case.

There are strong arguments that a defendant's financial status should play no role, at any stage of the proceedings, in deciding the severity of punishment in our system of government. This Court has repeatedly cautioned that introduction of evidence of a defendant's wealth may be unfair and unduly prejudicial to large, nonresident corporate defendants, and may raise special due process problems. *See TXO*, 509 U.S. at 464 ("[an] emphasis on the wealth of the wrongdoer increase[s] the risk that the award may [be] influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"); *Honda*, 512 U.S. at 432; ("the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences").

In addition, "[b]asing a decision on income and assets . . . calls into question the courts' commitment to do equal justice to the rich and poor." *Pivot Point*, 932 F. Supp. at 223 (Easterbrook, J., sitting by designation). Punitive damages, of course, "share key characteristics of criminal sanctions" (*Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 281 (1994)), and it is difficult to imagine this Court endorsing the imposition of a harsher criminal sanction against a citizen based on his or her financial status. As the Court stated in *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (per curiam) "A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that . . . those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed." *See, e.g., Robinson v. California*, 370 U.S. 660 (1962) (punishment of "status" held unconstitutional); *see also Powell v. Texas*, 392 U.S. 514 (1968) (punishment can only be inflicted on the basis of the defendant's wrongful acts or behavior, not on the basis of status); *id* at 543 ("Punishment for a status is particularly obnoxious . . . .") (Black, J., concurring).

Using wealth as a factor in punishing a corporation also is irrational. The wealth of corporations, unlike that of individuals, is not even arguably relevant to punitive damages because "[c]orporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law." *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992); II American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury* 253-255 (1991) (measuring the appropriateness of a punitive award based on a corporation's net worth "cannot be justified even by the rationale of economic deterrence, let alone retributive punishment"); *cf. BMW*, 517 U.S. at 591 (Breyer, J., concurring); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268-69 (1981) ("it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality . . . the impact on the individual tortfeasor of this deterrence in the air is at best uncertain"); *Lane v. Hughes Aircraft Co.*, 993 P.2d 388, 402 (Cal. 2000) (Brown, J., concurring) (a defendant's wealth cannot provide an "upper limit" to punitive damages because "even for a large corporation, a relatively modest punitive damage award may be sufficient to induce an end to the offensive conduct").

The defendant's wealth simply has no place in the *BMW* analysis. As Justice Breyer observed in his *BMW* concurrence, the wealth factor is an "open-ended basis for inflating awards when the defendant is wealthy." 517 U.S. at 591. Where a reviewing court infuses its excessiveness review with consideration of a large corporate defendant's nationwide wealth, the wealth factor inevitably obliterates the actual *BMW* guideposts and principles. Indeed, here, the Nevada Supreme Court based its decision *solely* on Dillard's "nationwide worth," and refused even to address the proper constitutional analysis under *BMW*.

Also, as this case demonstrates, reliance on the "nationwide worth" of a corporation flouts *BMW*'s ban on extraterritorial punishment, interferes with the policy choices of other States and the federal government, and imposes undue bur-

dens on interstate commerce, all in violation of both the Due Process Clause and the Commerce Clause. 517 U.S. at 571-72. Dillard's "nationwide worth" is the product of lawful conduct in other States that had absolutely no impact on Nevada consumers. Under *BMW*, Nevada is prohibited from punishing such conduct and the Nevada courts were precluded from considering this conduct—and the economic products of it—in deciding the proper amount of punitive damages and whether the punishment was so grossly excessive that it violated the Due Process Clause. As this Court declared as far back as 1881: "No State can legislate except with reference to its own jurisdiction .... Each State is independent of all the others in this particular." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

Indeed, Nevada has no more right under the Constitution to calculate punitive awards based on Dillard's profits from sales in other jurisdictions than it does to impose a sales tax on such out-of-state-sales. *See Hunt-Wesson, Inc. v. Franchise Tax Board*, __ U.S. __, 120 S. Ct. 1022 (2000) (invalidating California interest deduction offset provision as constituting an impermissible tax on income outside state's jurisdictional reach); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978). "The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777 (1992) (invalidating New Jersey's taxation of gain on out-of-state sale of asset) (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)); *see also Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 325 (1968) (invalidating application of Missouri tax apportionment statute to railroad's rolling stock); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 133-35 (1931) (invalidating application of North Carolina tax apportionment statute to New York manufacturer of leather goods); *see generally* Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275 (1999).

Here, the consideration of Dillard's nationwide worth contravened all of these principles, and permitted Beckwith's counsel to whip the jury into a frenzy with inflammatory rhetoric concerning Dillard's "corporate jets," its nationwide activities, and the simple fact that it is a large corporation based outside of Nevada. The Nevada Supreme Court further compounded the impact of these improper considerations by abandoning the constitutional analysis mandated by this Court in *BMW*, and by applying instead a "financial annihilation" standard that places no meaningful constraints on the jury's discretion. Given the important and recurring nature of the problem, and the conflicting, confusing rulings by the lower courts on this issue, the Court should grant certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

May 8, 2000

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APPENDIX

DILLARD DEPARTMENT STORES, INC.,
A Delaware Corporation;
and DILLARD'S NEVADA, INC.,
A Nevada Corporation, Appellants,

v.

DELORIS BECKWITH, Respondent.

No. 31378

Supreme Court Of Nevada

Dec. 13, 1999, Filed

Rehearing Denied Feb. 22, 2000.

John Peter Lee, Ltd., Barney C. Ales and Paul C. Ray, Las Vegas, for Appellants.

Donald J. Campbell & Associates and J. Colby Williams, Las Vegas, for Respondent.

BEFORE THE COURT *EN BANC*.

OPINION

LEAVITT, J.

Deloris Beckwith, sixty-four years of age, was a twenty-five-year employee of Dillard Department Stores (Dillard) and an area sales manager for nineteen years. She injured her back at work and filed a workers' compensation claim. Dillard is a self-insured employer. Beckwith was asked to return to work, but her doctor refused to release her because of her condition. When Beckwith failed to return to work, Dillard filled her job with another manager. Upon her return, Beckwith was demoted to an entry-level sales position with a forty-percent reduction in salary and benefits. She resigned and commenced this action.

FACTS

Beckwith was an exemplary employee of Dillard who had never received an annual review rating of less than "satisfactory" and most of her reviews rated her "very good" or "outstanding." Her salary was $41,000 per year, and she enjoyed

a benefit package that included medical coverage and a retirement plan. Beckwith strained her back at work while attempting to move a large mahogany table. Her injuries rendered her unable to walk upright or without assistance. A doctor recommended by Dillard certified her as temporarily disabled secondary to acute lumbosacral strain. Another doctor referred by Dillard agreed. The store manager requested that Beckwith return to work prior to her release from the doctor, even though the manager knew she had not been released. Beckwith failed to return to work when requested, and another person was given her position. The store manager later informed her by telephone that she had been replaced.

Beckwith returned to Dillard for light duty work approximately a month after the injury. She was assigned an entry-level position, which included document filing. Thereafter, she was asked to leave a weekly department managers' meeting because she no longer served in a management position. All of the other area sales managers and assistant managers observed Beckwith's humiliation as a result of the incident.

Beckwith was ultimately given two choices, resignation or a permanent entry-level sales associate position with a forty-percent cut in wages and benefits. She accepted the demotion because she was her sole support and needed the medical benefits. Beckwith was assigned to the ladies' ready-to-wear division, one of the most difficult departments in which to make daily sales quotas. If entry-level sales associates did not make their daily quotas, they could be docked part of their pay or be fired. After Beckwith began working in sales, the teenage sales associates would laugh at her behind her back, and additionally, other Dillard employees in the store talked about Beckwith's situation and why she was demoted. At one point when Beckwith walked into the employee lounge at lunchtime, the room went silent and people stared at her. Beckwith twice complained to management about the humiliation she was experiencing and its effect on her health. She finally resigned one week before her twenty-fifth year with Dillard.

At the time Beckwith was released to return to work there were two area sales manager positions open for which she was qualified, but management determined she was not eligible for an area sales manager position, a post she held prior to her demotion. She was notified the demotion was because she took time "off for workman's [sic] comp."

Beckwith fell into a depression and was treated by a psychiatrist for a major depressive disorder. She was treated with antidepressant medication and psychotherapy.

After leaving her job, Beckwith filled out applications for employment at several department stores, called friends who worked at different stores to inquire if any positions were open and consulted a friend who owned an employment agency in attempts to find work. She called Sears and J.C. Penney's to see if they had openings and filled out applications. She also filed an application with Neiman-Marcus. Nothing came of these efforts. At trial evidence was presented that most department stores have a policy to promote from within and for that reason, Beckwith would not have a chance to be hired as a manager at any comparable department store.

The jury awarded $424,028 in compensatory damages on the tortious constructive discharge claim and $200,000 on the intentional infliction of emotional distress cause of action. The jury also awarded punitive damages and after reduction of each claim to three times the compensatory damages the punitive damages totaled $1,872,084. The total damages awarded were $2,496,112. The court also awarded attorney's fees in the amount of $518,455 pursuant to NRS 17.115 and NRCP 68.

DISCUSSION

Tortious Constructive Discharge

Employees in Nevada are presumed to be employed "at-will" unless the employee can prove facts legally sufficient to show a contrary agreement was in effect. *Vancheri v. GNLV Corp.*, 105 Nev. 417, 777 P.2d 366 (1989). The at-will rule gives the employer the right to discharge an em-

ployee for any reason, so long as the reason does not violate public policy. *Vancheri* at 421, 777 P.2d at 369; *K Mart Corp. v. Ponsock*, 103 Nev. 39, 47, 732 P.2d 1364, 1369 (1987).

Previously, we have specifically held that "the at-will employment rule is subject to limited exceptions founded upon strong public policy; and the failure of the legislature to enact a statute expressly forbidding retaliatory discharge for filing workmen's compensation claims does not preclude this Court from providing a remedy for what we conclude to be tortious behavior." *Hansen v. Harrah's*, 100 Nev. 60, 63, 675 P.2d 394, 396 (1984).

Dillard claims a private cause of action for tortious discharge for filing a workers' compensation claim no longer exists in Nevada after the legislature, in 1995, passed NRS 616D.030:

> 1. No cause of action may be brought or maintained against an insurer or a third-party administrator who violates any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS.
>
> 2. The administrative fines provided for in NRS 616B.318 and 616D.120 are the exclusive remedies for any violation of this chapter or chapter 616A, 616B, 616C or 617 of NRS committed by an insurer or a third-party administrator.

We have recognized:

> [R]etaliatory discharge by an employer stemming from the filing of a workmen's compensation claim by an injured employee is actionable in tort. Since both the cause of action and the remedy are governed by the law of torts, there is no basis for administrative relief within the framework of the state industrial insurance system . . . ."

Hansen, 100 Nev. at 64-65, 675 P.2d at 397.

The statutory scheme applies only to the administration of the act. The statutes set forth fines to be paid for violations of

the act, such as not paying claimants properly, or at all. It also provides that a self-insured employer may lose its certification if it violates the workers' compensation statutes. NRS 616D.030, as part of this statutory scheme, does not affect the case law of tortious discharge against public policy.

> [A] tortious constructive discharge is shown to exist upon proof that: (1) the employee's resignation was induced by action and conditions that are violative of public policy; (2) a reasonable person in the employee's position at the time of resignation would have also resigned because of the aggravated and intolerable employment actions and conditions; (3) the employer had actual or constructive knowledge of the intolerable actions and conditions and their impact on the employee; and (4) the situation could have been remedied.

Martin v. Sears, Roebuck and Co., 111 Nev. 923, 926, 899 P.2d 551, 553 (1995) (citing *Brady v. Elixir Industries*, 196 Cal. App. 3d 1299, 1306, 242 Cal. Rptr. 324 (Ct. App. 1987)). Here, the jury was properly instructed on the above elements.

We have held that "Nevada's workmen's compensation laws reflect a clear public policy favoring economic security for employees injured while in the course of their employment." *Hansen*, 100 Nev. at 63, 675 P.2d at 396.

Beckwith also requested and received a jury instruction concerning the provisions of NRS 616C.530, which provides that an insurer shall follow certain priorities in returning an injured employee to work, the first priority being to "[r]eturn the injured employee to the job he had before his injury." Dillard complains that the instruction created a strict liability standard and in effect directed a verdict against it.

We disagree. The instruction, which by its terms only applies to operatives of a public or private workers' compensation plan, was offered to demonstrate Nevada's policy with regard to injured workers. The instruction was not offered as an assertion of strict liability or that a violation of NRS

616C.530 is a claim for which a worker may receive monetary damages. Beckwith's claim was that Dillard violated public policy by requesting her to return to work prior to being medically released. Dillard then punished Beckwith for her refusal to return to work against doctor's orders by demoting her. Clearly, the public policy of this state favors "economic security for employees injured while in the course of their employment." We conclude that the failure to follow the priorities set forth in the statute, together with Dillard's improper request that Beckwith return to work against doctor's orders, was a direct violation of that public policy. One of the elements necessary to prove constructive tortious discharge is that the action by the employer was in violation of public policy. The instruction was proper for this purpose. The judgment as to the tortious constructive discharge is affirmed.

Intentional Infliction of Emotional Distress

The elements of a cause of action for intentional infliction of emotional distress are "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation." *Star v. Rabello*, 97 Nev. 124, 125, 625 P.2d 90, 92 (1981) (citation omitted). We have also held the "tort of intentional infliction of emotional distress is recognizable in the employment termination context." *Shoen v. Amerco, Inc.*, 111 Nev. 735, 747, 896 P.2d 469, 476 (1995). In the present case, there was substantial evidence presented to support the intentional infliction of emotional distress claim. "[A] jury's verdict supported by substantial evidence will not be overturned unless the verdict is clearly erroneous when viewed in light of all the evidence presented." *Frances v. Plaza Pacific Equities*, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993) (citing *Bally's Employees' Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989)) (emphasis deleted).

Dillard did not offer Beckwith, a longtime employee, her previous position as an area sales manager when she returned to work after her injury. This refusal occurred despite the

fact that two other area sales manager positions were open for which Beckwith was qualified. She was also forced to take an entry-level position with a forty-percent reduction in salary and was told her demotion was directly related to her claim for workers' compensation. Ultimately fellow employees openly speculated as to the reason for Beckwith's demotion, and her complaints to management that her job situation was having an adverse effect on her health were ignored.

The elements of an intentional infliction of emotional distress claim are supported by the evidence and record. The judgment as to intentional infliction of emotional distress is affirmed.

Compensatory Damages

Dillard asserts no compensatory damages should be allowed because the evidence did not show that Beckwith took steps to mitigate her damages, and her economic expert's figures were calculated on the assumption she would retire at age seventy-five. The jury was given instruction number forty-one, which reads as follows:

> Plaintiff Beckwith has a duty to mitigate her damages, that is an affirmative burden to act to minimize her damages. Defendants had the burden of proving that plaintiff failed to mitigate her damages. To satisfy this burden, defendants must prove that during the time in question (1) there were substantially equivalent jobs available, which plaintiff Beckwith could have obtained, and (2) that plaintiff failed to use reasonable diligence in seeking one
>
> The phrase "substantially equivalent" means employment which affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the position which plaintiff Beckwith previously held with the defendants.

The second paragraph of the instruction is taken from *Sellers v. Delgado College*, 902 F.2d 1189, 1193 (5th Cir. 1990). Dillard objected because the phrase "substantially equiva-

lent" was applied in a Title VII federal case. Instead, Dillard suggested the second paragraph should read "she has a duty to seek reasonable alternative employment; the Plaintiff should accept any work which she could perform." This language was taken from *Southern Pacific Transportation Company v. Fitzgerald*, 94 Nev. 241, 243, 577 P.2d 1234, 1235 (1978). That case involved a personal injury action under the Federal Employers' Liability Act and was not a tortious constructive discharge case. In Fitzgerald we also said it was "unclear whether any bona fide offers were in fact made, or whether they related to reasonable alternative employment for a man with respondent's disabilities." *Id.*

In a similar wrongful discharge case we approved of an instruction which provided that an employee's duty to mitigate damages included "the seeking and acceptance of alternate employment." *Beales v. Hillhaven, Inc.*, 108 Nev. 96, 101, 825 P.2d 212, 215 (1992). In *Beales* we recognized that "the jury was instructed that *Beales* had the obligation to mitigate her damages by seeking other employment. She testified that she could not find employment in her field once she returned to Reno in 1988. Apparently, the jury believed her." *Beales* at 102, 825 P.2d at 216 (emphasis added). We conclude that the terms "substantial equivalent" and "reasonable alternative" are not so disparate in meaning as to warrant refusal. Thus, the error in the verbiage was harmless.[1]

Here there was ample testimony by Beckwith concerning her efforts to mitigate her damages. She was examined and cross-examined on this point. The jury was properly instructed on Beckwith's duty to mitigate her loss. "The question was one for the jury and beyond the scope of our review." *United Ass'n. Journeymen v. Stine*, 76 Nev. 189, 218, 351 P.2d 965, 980-81 (1960) (citations omitted).

---

[1] We note that "trial courts" should refrain from using the instruction given in this case. *Beales* states the proper standard.

Dillard failed to present any expert evidence to counter Beckwith's economic expert concerning her future losses. Once the jury found Beckwith was entitled to damages, "it was entitled to weight [sic] the variables and award . . . the appropriate amount." *Beales* at 102, 825 P.2d at 216. The compensatory damages awarded by the jury are proper and supported by substantial evidence in the record.

Punitive Damages

"A plaintiff is never entitled to punitive damages as a matter of right; their allowance or denial rests entirely in the discretion of the trier of fact." *Ramada Inns v. Sharp*, 101 Nev. 824, 826, 711 P.2d 1, 2 (1985). "It is the responsibility of the trial court to determine whether, as a matter of law, the plaintiff has offered substantial evidence of malice in fact to support a punitive damages instruction." *Wickliffe v. Fletcher Jones of Las Vegas*, 99 Nev. 353, 356, 661 P.2d 1295, 1297 (1983) (citations omitted). Punitive damages are limited to three times the compensatory damages, where, as here, compensatory damages are $ 100,000 or more. NRS 42.005(1)(a).

Dillard objected to the trial judge's decision to allow the nationwide worth, rather than just the worth of Dillard's Nevada, Inc., to determine the amount of punitive damages to award. We have previously allowed a nationwide worth when a jury decides punitive damages. Specifically, we have recognized "[t]he wealth of a defendant is directly relevant to the size of an award, which is meant to deter the defendant from repeating his misconduct as well as punish him for his past behavior." *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 593, 763 P.2d 673, 677 (1988) (citing *Midwest Supply, Inc. v. Waters*, 89 Nev. 210, 213, 510 P.2d 876, 878-79 (1973)).

The general rule concerning the award of excessive punitive damages has been previously stated by this court:

> Heretofore, we have recognized the subjective nature of punitive damages and the absence of workable standards by which to evaluate the propriety of such an award. Accordingly, we have allowed

> that determination to rest with the discretion of the trier of the fact unless the evidence introduced at trial shows that the amount awarded by the jury would financially destroy or annihilate the defendant in which event we would attempt an appropriate adjustment of the award.

Hale v. Riverboat Casino, Inc., 100 Nev. 299, 306, 682 P.2d 190, 194 (1984) (citations omitted).

In this case, the trier of fact determined the amount of punitive damages, and the trial court reduced the sum to an amount allowed by the statute. The award will not financially destroy or annihilate Dillard. Therefore, the punitive damage award is affirmed.

Beckwith is entitled to post-judgment interest on the punitive damage award. We recently modified our ruling in Ainsworth concerning post-judgment interest on punitive damages. We held that interest should accrue to compensate a party for the loss of the use of the money awarded in the judgment until paid. See *Wohlers v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (1998); *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 962 P.2d 596 (1998). Accordingly, Beckwith's punitive damage award shall accrue interest at the legal rate from the date of the judgment on the jury verdict.

Attorney's Fees

Dillard objects to the award of attorney's fees to Beckwith. Prior to trial an offer of settlement was made by Beckwith pursuant to NRS 17.115 and NRCP 68. She agreed to settle the matter for a total of $ 187,000, broken down to $93,500 as to each of the two Dillard entities. The purpose of NRS 17.115 and NRCP 68 is to save time and money for the court system, the parties and the taxpayers. They reward a party who makes a reasonable offer and punish the party who refuses to accept such an offer. *Muije v. A North Las Vegas Cab Co.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990).

"It is within the discretion of the trial court judge to allow

attorney's fees pursuant to Rule 68" and "unless the trial court's exercise of discretion is arbitrary or capricious, this court will not disturb the lower court's ruling on appeal." *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985).

Dillard claims it litigated its defense in good faith and it was not bad faith for it to reject Beckwith's offer. We have set forth the factors a trial judge must exercise in its discretion regarding the allowance of attorney's fees:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

The trial judge, in a separate hearing, found it was unreasonable to reject such a "rock-bottom" offer given at the beginning of the case before any discovery expense had been incurred. The trial court considered the quality of the representation at trial, the reputation of the lawyers, their hourly rate of billing, the timing and reasonableness of the offer and all of the necessary factors set forth in *Beattie*. The trial judge deducted from the total amount of attorney's fees sought the amount Dillard had previously paid as sanctions for discovery abuses. There was no abuse of discretion on the part of the trial judge, the award of attorney's fees was proper and it is affirmed.

The judgment on the jury verdict for compensatory and punitive damages is affirmed.

ROSE, C.J. YOUNG,. SHEARING, AGOSTI and Becker, JJ., concur.

MAUPIN, J., concurring.

I agree with the result reached by the majority. I write separately to note my disagreement with the majority's affirmation of the instruction containing the language from NRS 616C.530. That provision sets priorities for workers' compensation insurers in their efforts to return injured workers to work. The priorities articulated do not create a legal standard governing an employer's re-assimilation of an injured worker to the work place. I can see no legislative intent to that effect. Thus, the instruction was couched in terms of a specific duty that did not apply to employers. However, because the statutory language did not add a great deal to the standard of recovery that respondent was required to satisfy below, the giving of the statutory instruction was harmless error.

I also wish to emphasize in this separate opinion my view that the enactment of NRS 616D.030 was in no way calculated to overturn our decision in *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984), and its progeny.

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DISTRICT COURT

CLARK COUNTY, NEVADA

DELORIS BECKWITH, Plaintiff, vs. DILLARD'S INC., a Delaware Corporation, formerly known as DILLARD DEPARTMENT STORES, INC., Defendant.	CASE NO: A364772 DEPT NO: VII DOCKET: P Hearing Date: October 30, 1999 Hearing Time: 9:00 a.m.

ORDER REGARDING POST-TRIAL MOTIONS

The following post-trial motions came on for hearing before the Honorable Mark Gibbons in Department VII of the Eighth Judicial District Court on October 30, 1997:

1. Defendant's Motion for Judgment Notwithstanding the Verdict;

2. Defendant's Motion to Retax and Settle Costs;

3. Plaintiff's Countermotion for Attorneys' fees; and

4. Defendant's Motion to Quash Subpoenas.

Donald J. Campbell and J. Colby Williams appeared on behalf of the plaintiff, and John Peter Lee, Barney C. Ales, and Paul C. Ray appeared on behalf of defendant Dillard's, Inc. (formerly known as Dillard Department Stores, Inc.); the Court having read and reviewed the motions on file before it, listened to argument of counsel, and being fully advised, enters the following Order:

IT IS HERBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Judgment Notwithstanding the Verdict is GRANTED in part, and DENIED in part. Defendant's motion is granted insofar as it seeks to reduce the verdict regarding punitive damages to three times the amount of compensatory damages awarded by the jury. Thus, the punitive damages awarded on plaintiff's claim of Tortious Constructive Discharge in Violation of Public Policy are reduced from $2.8 million to $1,272,080.00 (3 x $424,028.00), and the punitive damages awarded on plaintiff's claim for Intentional Infliction of Emotional Distress are reduced from $1.4 million to $600,00.00 (3 x $200,000.00). Accordingly, the total amount of compensatory and punitive damages awarded to plaintiff is $2,496,112.00. Defendant's motion is denied in all other respects.

IT IS FURTHER ORDERED that Defendant's Motion to Relax and Settle Costs is GRANTED in part, and DENIED in part. Defendant's motion is granted insofar as it seeks to retax costs attributable to Supreme Court Clerk filing fees, parking charges for witnesses, and services rendered by Bruce Evans. The Court finds that these costs are not recoverable under NRS 18.005. After excluding the foregoing items, the Court awards plaintiff $44,670.68 for taxable costs based on her Memorandum of Costs and Disbursements. Defendant's motion is denied in all other respects.

IT IS FURTHER ORDERED that Plaintiff's Countermotion for Attorney's Fees is GRANTED. The Court, after considering the factors enumerated in *Beattie v. Thomas*, 99

Nev. 579, 668 P.2d 268 (1983), finds that plaintiff is entitled to recover her attorney's fees incurred from December 9, 1996, the date plaintiff's offers of judgment to defendants expired. After reducing the foregoing by the amount of attorney's fees previously awarded to plaintiff in this matter, $23,640.00, the Court awards plaintiff $518,455.00 for attorneys' fees.

IT IS FURTHER ORDERED that Defendant's Motion to Quash Subpoenas is GRANTED. While defense counsel does not have to produce its billing records, the Court does order defendant to file an affidavit detailing the hourly rates charged by its attorneys in this matter so that the Court may confirm the reasonableness of the rates charged by plaintiff's attorneys.

IT IS FURTHER ORDERED that plaintiff is awarded prejudgment interest on the principal amount of $200,000.00 beginning from October 14, 1996, the date the complaint was served on Dillard Department Stores, Inc. Additionally, postjudgment interest on the aggregate amount of $3,059,237.68 shall accrue continually hereafter from the date judgment is entered until paid.

IT IS FURTHER ORDERED that as a condition of granting Defendant's Motion to Stay Execution, which was previously submitted to and considered by the Court, defendant shall post a supersedeas bond sufficient to permit full satisfaction of the total judgment ($3,059,237.68), plus two years of postjudgment interest calculated at the current rate of 10.5% ($642,439.76).

DATED this 6 day of November, 1997

/s/
DISTRICT COURT JUDGE

SUBMITTED BY:

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By /s/
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DISTRICT COURT

CLARK COUNTY, NEVADA

DELORIS BECKWITH, Plaintiff,	
	CASE NO: A364772
	DEPT NO: VII
	DOCKET: P
vs.	
DILLARD'S INC., a Delaware Corporation, formerly known as DILLARD DEPARTMENT STORES, INC., Defendant.	Dates of Trial: 8/25/97 - 9/05/97; 9/15/97 - 9/17/97; and 9/29/97

JUDGMENT

The trial of this case was heard from August 25 through September 5, 1997, and from September 15 through September 17, 1997, and the punitive damages proceedings were heard on September 29, 1997, before this Court and a jury in Department VII, Donald J. Campbell and J. Colby Williams appeared on behalf of the plaintiff, and John Peter Lee and Barney C. Ales appeared on behalf of defendant Dillard's,

Inc. (formerly known as Dillard Department Stores, Inc.). After hearing the evidence, the instructions of the court, and the arguments of eounsel, the jury deliberated and then duly answered the jury verdict form submitted to them and duly rendered a verdict as to the complaint. In accordance with the verdict of the jury, and good cause appearing:

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that:

1(a). Final judgment is entered in favor of the plaintiff, DELORIS BECKWITH, under her Second Cause of Action (Tortious Constructive Discharge in Violation of Public Policy) against defendant DILLARD'S, INC. (formerly known as DILLARD DEPARTMENT STORES, INC.) in the principal amount of $424,028.00;

(b). Final judgment is entered in favor of the plaintiff, DELORIS BECKWITH, against defendant DILLARD'S INC. for punitive damages under her Second Cause of Action (Tortious Constructive Discharge in Violation of Public Policy) in the principal amount of $1,72,084.00;

(c). Final judgment is entered in favor of the plaintiff, DELORIS BECKWITH, under her Fifth Cause of Action (Intentional Infliction of Emotional Distress) against defendant DILLARD'S INC. in the principal amount of $200,00.00; and

(d). Final judgment is entered in favor of the plaintiff, DELORIS BECKWITH, against defendant DILLARD'S INC. for punitive damages under her Fifth Cause of Action (Intentional Infliction of Emotional Distress) in the principal amount of $600,00.00 for a total sum of $2,496,112.00. In addition:

2. Plaintiff is awarded $51,455.00 for attorney's fees;

3. Plaintiff is awarded $44,670.68 for taxable costs; and

4. Plaintiff is awarded prejudgment interest on the principal amount of $200,00.00 beginning from October 14, 1996, the date the complaint was served on Dillard Department Stores, Inc. Additionally, postjudgment interest on the

aggregate amount of $3,059,237.68 shall accrue continually hereafter from the date judgment is entered until paid.

IT IS FURTHER ORDERED AND ADJUDGED that in accordance with NRCP 54(b) this Court expressly determines that there is no just reason for delay in entering final judgment on the complaint and hereby expressly directs that final judgment upon the sums awarded on plaintiff's complaint be entered in favor of the plaintiff and against defendant; and the same is hereby entered.

DATED this 6 day of November, 1997.

/s/
DISTRICT COURT JUDGE

SUBMITTED BY:
DONALD J. CAMPBELL & ASSOCIATES

By /s/
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IN THE SUPREME COURT OF THE
STATE OF NEVADA

DILLARD DEPARTMENT STORES, INC. A DELAWARE CORPORATION; AND DILLARD'S NEVADA, INC., A NEVADA CORPORATION,

Appellants,

vs.

DELORIS BECKWITH,

Respondent.

No. 31378

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c)

It is so ORDERED.

FILED: Feb. 22, 2000

/s/ _____, C.J.
Rose

/s/ _____, J.
Young

/s/ _____, J.
Maupin

/s/ _____, J.
Shearing

/s/ _____, J.
Agosti

/s/ _____, J.
Leavitt

/s/ _____, J.
Becker

(2)

Supreme Court, U.S.
FILED
JUN 02 2000
CLERK

No. 99-1774

In The

Supreme Court of the United States

DILLARD DEPARTMENT STORES, INC. AND DILLARD'S NEVADA, INC.,

Petitioners,

v.

DELORIS BECKWITH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTION PRESENTED

Whether a punitive damages verdict rendered in a bifurcated proceeding and subject to a statutory cap may be upheld on state grounds and under *BMW of North America v. Gore*, 517 U.S. 559 (1996), when the corporate defendant never argued below that the punitive damage award was "grossly excessive" in violation of the Due Process Clause of the Fourteenth Amendment and *BMW's* three guideposts, but instead complained on the sole ground that it was improper for the jury to consider the company's nationwide net worth as one of many factors when determining the amount of punitive damages to award.

PARTIES TO THE PROCEEDING

The Petition incorrectly spells Respondent's name. The correct spelling of Respondent's name is Deloris Beckwith. Additionally, it should be noted that although the names Dillard Department Stores, Inc. and Dillard's Nevada, Inc. appear in the caption of the Nevada Supreme Court's opinion reported at 989 P.2d 882, both parties were actually removed from the caption in the lower court proceedings and replaced with Dillard's, Inc. based on: (i) filings with the Securities and Exchange Commission reflecting that Dillard Department Stores, Inc. had changed its name to Dillard's, Inc., and (ii) representations by Petitioners that Dillard's Nevada, Inc. was only a stock holding company that owned no stores. 9/29/97 Tr. 10-12; Dillard Answer to Interrogatory No. 14 dated 4/3/97.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Deloris Beckwith respectfully requests that the Court deny the Petition for a Writ of Certiorari filed by Petitioners Dillard Department Stores, Inc. and Dillard's Nevada, Inc. (collectively "Dillard") as it fails to present a question worthy of review.

STATEMENT OF THE CASE

A. Introduction

Less than three months after this Court denied a petition for a writ of certiorari in *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind.App. 1999), *cert. denied*, 120 S.Ct. 1424 (March 20, 2000), Dillard, now represented by the same counsel who represented Ford, asks this Court to review one of the questions presented in Ford's unsuccessful petition: whether consideration of a corporate defendant's nationwide net worth is proper when determining the propriety of a punitive damages award. Lest there is any doubt that the questions presented in both petitions are virtually identical, the Court need look no further than Dillard's own statement to the Nevada Supreme Court that "Ford Motor Company saw fit to file in the Supreme Court of the United States a Petition for a Writ of Certiorari on *exactly the same grounds* as Dillard's discusses in its Motion for Stay." Respondent's Appendix, 7a (emphasis added).[1] Dillard made the foregoing statement when asking the Nevada Supreme Court to stay the

[1] References to Petitioner's Appendix and Respondent's Appendix are cited herein as "App. ___" and "Resp. App. ___," respectively. References to Dillard's petition are cited herein as

remittitur in this action while it sought a writ of certiorari from this Court based on constitutional requirements purportedly enunciated in *BMW of North America v. Gore*, 517 U.S. 559 (1996). Resp. App., 5a-9a. The identity of the questions presented in the petitions is further evidenced by the facts that (i) Ford relied on the Nevada Supreme Court's opinion in its unsuccessful petition to this Court, *see* Resp. App. 7a, and, more significantly, (ii) Dillard's petition is comprised predominantly of near identical chunks of argument transplanted from Ford's petition. *See, e.g.*, Pet. 2-3, 9-12, 15-23. Apparently, Dillard and its new counsel believe that one size fits all.

Although the denial of certiorari does not constitute a decision on the merits, Beckwith respectfully submits that the issue here is even less worthy of this Court's review than that presented in *Ford*. While Dillard repeatedly chastises the Nevada Supreme Court for the latter's alleged failure to comply with the constitutional analysis mandated by *BMW*, the inevitable truth is that Dillard *never* argued in its postverdict motions, its briefs before the Nevada Supreme Court, or its petition for rehearing that the punitive damage award was "grossly excessive" under the Due Process Clause of Fourteenth Amendment – the issue addressed in *BMW*. 517 U.S. at 562. Indeed, at no time did Dillard ever make any reference to "due process," "the Fourteenth Amendment," or even the "Federal Constitution." Nor did Dillard ever present the

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"Pet. ___". References to the record below are cited herein as "(Date) Tr. ___," and cites to "AA" or "RA" refer, respectively, to Appellants' or Respondent's Appendix submitted on appeal to the Nevada Supreme Court.

argument that the punitive damage award was excessive in light of the *BMW* guideposts.

While Dillard made scant references to *BMW* in its briefs before the Nevada Supreme Court, though not its postverdict motions before the trial court or its petition for rehearing before the Nevada Supreme Court, it did so for the lone proposition that *BMW* precluded the trier of fact from considering a defendant's net worth when determining a punitive damage award. These oblique citations did not, however, properly present the federal claim that Dillard belatedly accuses the Nevada Supreme Court of "abandoning." *Cf. Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988). Accordingly, Dillard's disingenuous assault on the Nevada Supreme Court is a red herring that this Court may disregard. *Id.*

To the extent Dillard raised the "wealth" issue in isolation, the Nevada Supreme Court squarely addressed it. As will be set forth in more detail below, *BMW* never held that using wealth as one factor among many when determining a punitive damages award violates the Constitution. Nor did *BMW* hold that its three guideposts were meant to be exclusive of state common law factors used to evaluate excessiveness. There is no irreconcilable conflict in the lower courts on this issue. Dillard's petition should be denied.

B. Factual Background

Unlike *BMW*, which involved purely economic injury based on an automobile manufacturer's failure to disclose that the plaintiff's vehicle had been repainted prior to being sold as new, the instant matter involves the retaliatory discharge of a 25-year employee who was injured on

the job and merely sought to exercise her rights under Nevada's workers' compensation laws.

Deloris Beckwith was an exemplary employee of Dillard Department Stores and its corporate predecessors for twenty-five years. App. 1a-2a. While performing her duties, she suffered an industrial injury that was verified by two separate Dillard's physicians. *Id.* at 2a. Despite the physicians' diagnosis, and in direct violation of their recommended course of treatment, Dillard demanded that Beckwith return to work. *Id.* When Beckwith declined to do so, Dillard embarked on a campaign of harassment designed to get rid of her. First, Dillard replaced Beckwith as the Area Sales Manager of the Home Department, a position she had held for the last 19 of her 25 years with Dillard. *Id.* Within days of her return, Beckwith was intentionally humiliated in front of her peers. *Id.* Dillard then demoted Beckwith to an entry level sales clerk position with a corresponding cut in pay and benefits of over 40%. *Id.* When Beckwith complained to her superiors of her treatment and the adverse impact it was having on her health, she was bluntly told that her only other choice was to resign even though other managerial positions, for which she was admittedly qualified, were available. *Id.* at 2a-3a.

Because Beckwith was single and her sole support, she attempted to work in her demoted capacity. *Id.* at 2a. When Beckwith still did not resign, Dillard placed her in a store department known as "Siberia," where she was destined to fail and was known to suffer abuse by teenage clerks who had once been her subordinates. *Id.*; Respondent's Answering Br. 13-14. Faced with such a drastic cut in pay and unable to endure the humiliation caused by the severe reduction in rank, Beckwith finally

quit, one month shy of her twenty-fifth anniversary with Dillard. *Id.* at 2a-3a. Beckwith developed a major depressive disorder for which she consulted a psychiatrist. *Id.* at 3a. Beckwith's depression and its link to her termination were also verified in a subsequent independent medical exam performed by Dillard's retained psychiatrist. Respondent's Answering Br. 16.

Unable to find similar employment, Beckwith filed suit claiming that Dillard constructively discharged her in retaliation for taking time off following her industrial accident. Beckwith also claimed that Dillard intentionally inflicted emotional distress upon her in an effort to force her to quit her job. For its part, Dillard contended that Beckwith was not demoted in retaliation for having availed herself of benefits under the workers' compensation system but, rather, because of a history of poor "performance" and the fact that "she had become a caretaker manager." Respondent's Answering Br. 18.

At trial, Beckwith established a work history devoid of any disciplinary action, with most annual reviews being "very good" or "outstanding." App. 2a; Respondent's Answering Br. 6-8. Indeed, one review authored by Dillard's divisional vice-president described her as "a combination saint and longshoreman." Respondent's Answering Br. 7. In contrast, Beckwith's counsel introduced recent annual reviews of Beckwith's superiors, the store manager and the assistant store manager. Under the same criteria that Beckwith was graded with, both had received scathing reviews for poor performance, yet neither suffered the punishment exacted on Beckwith. *Id.* at 19-20. Dillard's trial counsel all but acknowledged the retaliatory nature of his client's conduct, stating "what [the store manager and assistant store manager] don't

have against them is the fact that they were there." *Id.* at 20.

Beckwith called an expert in the field of retail employment practices who testified that the manner in which Beckwith was constructively discharged had, for all practical purposes, ended her career and ruined any chance of obtaining similar employment. App. 3a; Respondent's Answering Br. 36-37. Beckwith called an economist who testified that she suffered economic losses of $424,028 based on a worklife expectancy of 9.78 years. *Id.* at 9a; Respondent's Answering Br. 17. Dillard never refuted the foregoing testimony with any experts of its own, acknowledging that "[t]hese numbers are all sustainable. There would be no difference. I'm not going to argue the numbers." *Id.*; Respondent's Answering Br. 17.

C. Trial Court Proceedings

1. Beckwith's trial began on August 25, 1997. Prior to closing arguments, the district court instructed the jury on the law. The court instructed that punitive damages were only authorized if the jury found "by clear and convincing evidence, that the defendants have been guilty of oppression, fraud or malice, express or implied, as will be explained." Resp. App. 1a-2a. The court then gave separate instructions that defined the terms "clear and convincing," "oppression," "conscious disregard," and "malice." *Id.* at 2a-3a. The definitions were taken directly from those set forth in NEV. REV. STAT. § 42.001. The court also instructed the jury that any assessment of punitive damages would occur in a subsequent proceeding. *Id.* at 2a. This instruction was based on NEV. REV. STAT. § 42.005(3), which requires that punitive damages may only be assessed in a bifurcated proceeding. Dillard's

counsel *never* objected to any of the foregoing instructions. 9/16/97 Tr. 14-21.

On September 17, 1997, the jury returned a unanimous verdict in Beckwith's favor, finding that Dillard had constructively discharged Beckwith in violation of public policy and intentionally, or with reckless disregard, inflicted emotional distress upon her. The jury awarded Beckwith $424,028 in compensatory damages for her constructive discharge claim and $200,000 in compensatory damages for her emotional distress claim. 2 AA 338-39.[2] The jury also found that Beckwith was entitled to punitive damages. *Id.* at 339.

2. Twelve days later, on September 29, 1997, the district court commenced the punitive damages phase of the trial in compliance with NEV. REV. STAT. § 42.005(3). Before presentations to the jury, the court considered a motion *in limine* filed by Dillard and resolved the punitive damage jury instructions. 9/29/97 Tr. 7-25. Dillard's motion *in limine* expressly conceded that its financial condition was relevant in assessing punitive damages, but argued that this consideration should be limited only to its Nevada stores, not the parent company. The district court judge acknowledged reading all the cases, including *BMW*. *Id.* at 7. Because *BMW* does not, however, address the issue raised in Dillard's motion, the district court decided the issue based on state law grounds,

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[2] Dillard continues to reargue and distort the role of NEV. REV. STAT. § 616C.530 in the lower court proceedings. Pet. 4-5. Because the Nevada Supreme Court thoroughly considered and rejected Dillard's state-based arguments on this issue, their injection into these proceedings is improper. App. 4a-6a; *BMW*, 517 U.S. at 577 ("only state courts may authoritatively construe state statutes").

which permit the consideration of a corporate defendant's net worth. *Id.* (citing *Ainsworth v. Combined Ins. Co.*, 763 P.2d 673 (Nev. 1988)). Dillard's contention that "the district court's ruling was based on Nevada's 'financial annihilation' standard," Pet. 6, is a blatant mischaracterization of the record.

Dillard also distorts the nature of the punitive damage instructions given to the jury. While it is true that the district court denied certain instructions requested by Dillard, it is equally true that Dillard's counsel, as in the first phase of trial, *never* objected to any of the 11 jury instructions given in the punitive damages phase of trial. 9/29/97 Tr. 18. Thus, Dillard's newly raised objection to the net worth instruction, cited at pages 6-7 of its petition, is tardy by any conceivable measure.

The district court gave the financial condition instruction only after instructing the jury to consider a variety of factors including, but not limited to, the reprehensibility of Dillard's conduct, society's goal of punishment and deterrence, and the reasonable relationship to the harm that had already occurred. 2 AA 354-65. Moreover, the district court specifically instructed the jury:

> Punitive damages shall not be awarded through passion and prejudice. The award of punitive damages which is in the discretion of the jury should not be used because the defendant constitutes the class known as big business.

Id. at 357. Unlike the foregoing instruction and those covering other factors, which required mandatory consideration, the instruction regarding consideration of Dillard's net worth was permissive in nature. *Id.* at 363.

Pursuant to NEV. REV. STAT. § 42.005(4), Beckwith did not introduce evidence of Dillard's financial condition until the punitive damage phase of trial. Dillard devotes

much of its petition to complaints regarding Beckwith's examination of Dillard executives about the company's financial condition. Like the jury instructions discussed *supra*, Dillard's counsel *never* objected during the examinations on any substantive grounds. 9/29/97 Tr. 28-57.

Dillard, also for the first time, similarly complains in its petition that Beckwith's counsel's closing argument "focus[ed] entirely on Dillard's wealth, size, and status as an out-of-state corporation." Pet. 7. Dillard is wrong. Beckwith's counsel began his closing argument by directing the jury to the district court's instructions and stressing the described goals of punishment and deterrence contained therein. 9/29/97 Tr. 58-59. When Beckwith's counsel did mention Dillard's wealth, most of the statements were quoted directly from Dillard's own annual reports and were discussed in the context of punishment and deterrence ("We leave it to your collective wisdom and understanding of the facts, taken in tandem with your understanding of the irreprehensible [sic] conduct and the harm done to my client to arrive at a number that is going to act as a deterrent and punishment to this corporation."). *Id.* at 63-67.

Beckwith's counsel never argued that the jury should impose punitive damages because Dillard was a so-called "out-of-state corporation." Similarly, Dillard's claim that Beckwith's counsel "repeatedly pleaded with the jury to 'pound' Dillard," Pet. 8, is taken out of context. Beckwith's counsel did not use the word "pound" because Dillard was big or an out-of-state corporation, but because one of Dillard's divisional presidents had taken the stand during trial and lied that Beckwith had been terminated for poor performance when all evidence was to the contrary. 9/29/97 Tr. 80-84. And while Dillard did

object to Beckwith's use of the Fortune 500 prior to closing arguments, it *never* objected to the foregoing or any other allegedly prejudicial remarks during or after the closings.

After deliberating for several hours, the jury again returned a verdict in Beckwith's favor, awarding her $2.8 million in punitive damages for her constructive discharge claim and $1.4 million in punitive damages for her emotional distress claim.

3. Dillard filed a motion for judgment notwithstanding the verdict and numerous attachments. 2 AA 366-455. Although Dillard raised numerous challenges to the jury's verdict, the only ground upon which it sought a reduction of the punitive damages award was state-based. *Id.* Specifically, Dillard argued that the punitive damages must be reduced to comply with NEV. REV. STAT. § 42.005(1)(a), which caps punitive damages at three times the amount of compensatory damages awarded when they exceed $100,000. 2 AA 368. Beckwith did not oppose this request, and the district court granted the relief sought by reducing the award more than $2.3 million (from $2.8 million to $1,272,084 on the discharge claim and from $1.4 million to $600,000 on the emotional distress claim). 10/30/97 Tr. 19-21.

At no time in its 16-page motion or its 18-page reply did Dillard ever cite *BMW*, "due process," the "Fourteenth Amendment," or the "Federal Constitution." Dillard also failed to present any argument regarding the "wealth" issue or Beckwith's counsel's closing argument during the punitive damage phase. At the hearing on the postverdict motions, the district court judge emphasized that he "want[ed] to give Mr. Lee and Mr. Ales and Mr. Ray an opportunity to say anything they want to say."

10/30/97 Tr. 3. Remarkably, Dillard still failed to raise any of the issues about which it now so petulantly complains.

In denying the remainder of Dillard's JNOV motion, the district court judge found that Dillard had "just trampled on [Beckwith's] rights," and further characterized its conduct as "unbelievable stupidity" and "incredible." 2 RA 485. This assessment was consistent with previous observations of Dillard's conduct throughout the course of pre-trial proceedings where one district court judge described Dillard as "brazen," and another jurist found Dillard intent upon causing Beckwith "as much grief as possible, whether it be within or without the rules." 1 RA 10-11; 2 RA 455-56.

D. Nevada Supreme Court Proceedings

In its 25-page opening brief Dillard never even mentioned, let alone analyzed, *BMW's* guideposts and how the punitive damage award was allegedly excessive thereunder. Again, Dillard never mentioned "due process," the "Fourteenth Amendment," or the "Federal Constitution." And Dillard never presented any argument regarding Beckwith's counsel's closing argument in the punitive damages phase.

Instead, Dillard made scattered citations to *BMW* for the sole proposition that it precluded the jury's consideration of a company's nationwide worth when assessing punitive damages. In response, Beckwith analyzed *BMW* and acknowledged its holding that one state cannot impose punitive damages to punish a defendant for its lawful conduct in another state. Respondent's Answering Br. 37. Beckwith pointed out, however, that she had never

argued that Dillard should be punished for conduct outside Nevada. *Id.* at 38. Beckwith also argued that *BMW* never addressed the relevant scope of inquiry into a defendant's financial condition when assessing punitive damages. *Id.* Accordingly, Beckwith directed the Nevada Supreme Court to relevant state law precedent that had allowed the consideration of a corporate defendant's net worth. *Id.*

Though Dillard expanded arguments on other issues in its 41-page reply brief, it still failed to conduct any meaningful analysis of *BMW* other than vague references that consideration of Dillard's net worth was tantamount to punishment for out-of-state conduct. Appellant's Reply Br. 15-16. Again, Dillard never mentioned *BMW's* guideposts or how the award was excessive thereunder. Instead, it argued simply that the punitive damage award must be "vacated." *Id.* at 14.

On December 13, 1999, the Nevada Supreme Court, sitting *en banc*, issued its unanimous opinion affirming the district court's judgment in its entirety. With respect to the punitive damage award, the Nevada Supreme Court squarely addressed the only issue raised by Dillard, to wit: whether it was improper to allow the jury's consideration of Dillard's nationwide net worth. App. 9a-10a. The Nevada Supreme Court based its decision on state law precedent that had long allowed the consideration of a company's nationwide net worth when assessing punitive damages. *Id.* The Nevada Supreme Court did not conduct an excessiveness analysis under *BMW* because Dillard never presented this claim. The Nevada Supreme Court also recognized that the district court had

properly reduced the award by over $2.3 million pursuant to the legislative enactment embodied in NEV. REV. STAT. § 42.005(1)(a). *Id.*

Dillard filed a 10-page petition for rehearing with the Nevada Supreme Court on January 3, 2000. Like so many of the papers and arguments presented by Dillard below, the rehearing petition is notable not for what it says but, rather, what it fails to say. Dillard never argued, as is required under Rule 40(a) of the Nevada Rules of Appellate Procedure, that the Nevada Supreme Court overlooked or misapprehended its *BMW*-based argument. Resp. App. 10a-25a. Indeed, Dillard never even cited *BMW* or raised the allegation that the Nevada Supreme Court failed to conduct a proper constitutional analysis thereunder. *Id.* Dillard's chronic failure in this regard is telling given its extensive, albeit unsuccessful, arguments that the Nevada Supreme Court had misapprehended or overlooked other court opinions on issues unrelated to the punitive damage question. *Id.*

The Nevada Supreme Court denied Dillard's petition for rehearing on February 22, 2000. App. 20a.

REASONS FOR DENYING THE WRIT

Just four years after this Court decided *BMW* and less than three months after it denied Ford's attempt to revisit that case, Dillard and its new counsel, recycling the same arguments they made when representing Ford, claim this Court's review is necessary to "resolve conflicts and confusion that have arisen since *BMW* . . . and to ensure that . . . the guideposts continue to have meaningful effect." Pet. 10. Citing unrelated cases involving punitive damage awards in the billions and hundreds of

millions of dollars, Dillard contends that lower courts have continued to uphold excessive awards on grounds entirely inconsistent with *BMW*, including a defendant's nationwide wealth. *Id.*

Ironically, Dillard asks this Court to ensure that *BMW's* guideposts "continue to have meaningful effect" in a case where the defendant never even mentioned *BMW's* guideposts or presented the question of excessiveness thereunder. This Court uses its precious resources to decide cases and controversies under Article III of the Constitution, not the policy agendas of law firms that seek to apply verbatim legal arguments to factually, procedurally, and legally distinct cases in hopes of pushing through a version of judicially enacted tort reform.

When the case below is actually analyzed, it is clear that Dillard received all the procedural and substantive due process to which it is entitled. As a threshold issue, Dillard did not properly present a federal claim of excessiveness to the Nevada Supreme Court. Even if Dillard had properly presented a claim below, the question presented in Dillard's petition is not worthy of review in light of the specific facts of this case. The Nevada legislature has enacted strict laws governing the guidelines and procedures for imposing punitive damages, including quantitative limits thereon. Here, the district court reduced the punitive damage award by over 55% to comply with these legislative safeguards, and the Nevada Supreme Court reviewed the jury's verdict on the narrow ground requested by Dillard and affirmed the verdict in accordance with established law.

I. THE QUESTION OF EXCESSIVENESS UNDER *BMW'S* GUIDEPOSTS IS NOT PROPERLY BEFORE THE COURT BECAUSE IT WAS NEITHER PRESSED NOR PASSED UPON IN THE NEVADA SUPREME COURT.

Dillard asks this Court to grant certiorari because the decision below directly conflicts with *BMW* and other decisions of this Court. Pet. 10. The purported "conflict," according to Dillard, arises from the Nevada Supreme Court's lack of "any inquiry whatsoever into the necessary due process guideposts" and its "utter[ ] disregard [of] the *BMW* analysis." *Id.* at 10. Dillard, however, ignores this Court's pronouncement that:

> [w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented . . . and the aggrieved party bears the burden of defeating this assumption [ ] by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented here.

Adams v. Robertson, 520 U.S. 83, 86-87 (1997) (per curiam) (citations and internal quotation marks omitted). Dillard cannot satisfy the foregoing burden under any of this Court's recognized methods for proper presentation. *Id.* at 87.

In 66 pages of appellate briefs, Dillard never presented a federal claim of excessiveness under *BMW's* guideposts to the Nevada Supreme Court. Instead, Dillard argued solely that it was improper for the jury to consider a corporate defendant's nationwide net worth when assessing punitive damages. Appellant's Opening Br. 22-23; Appellant's Reply Br. 15-16. While Dillard made scattered references to *BMW* in three pages of its briefs, it

never mentioned, as it repeatedly does now, the due process guideposts, the "Fourteenth Amendment," the "Commerce Clause," or the "Federal Constitution." This Court has instructed that "the vague appeal to constitutional principles does not preserve [a petitioner's] . . . due process claims. A party may not preserve a constitutional challenge by generally invoking the constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). Nor does the discussion of a potentially relevant federal case in the context of an unrelated argument qualify as sufficient presentation to the state court. *Adams*, 520 U.S. at 88. At best, that is all Dillard did in its appellate briefs.

Dillard's petition for rehearing similarly failed to present a federal claim with " 'fair precision and in due time.' " *Id.* at 87-88 (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)). Dillard devotes much energy to excoriating the Nevada Supreme Court for a "wholesale abdication of its constitutional responsibility to provide meaningful review of punitive damages awards" under *BMW* and this Court's other precedent. Pet. 12-15. When given the opportunity to address this alleged "wholesale abdication," however, Dillard *never* even raised the subject as a basis for its 10-page petition for rehearing. Resp. App. 10a-25a. Dillard's utter failure in this regard is fatal under Rule 40(a) of the Nevada Rules of Appellate Procedure, which requires a petition for rehearing to "state briefly and with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended. . . . ***[A]ny claim that this court has overlooked or misapprehended a material question of law or has overlooked,***

misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where the petitioner has raised the issue." (emphasis added).

By attempting to present these claims now, Dillard invites this Court to disturb the finality of a Nevada judgment "on a federal ground the state court did not have an occasion to consider." *Adams*, 520 U.S. at 90. This Court has characterized such a request as " 'unseemly in our dual system of government.' " *Id.* (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981)). The Court should deny Dillard's invitation.

II. THE AWARD DOES NOT VIOLATE DUE PROCESS.

Even if Dillard properly presented a claim below, its petition for certiorari should be denied on the merits. Dillard cannot establish that the procedures employed in the district court and Nevada Supreme Court were unfair. Nor can Dillard establish that *BMW* rendered consideration of wealth, as one of many factors, impermissible when determining the propriety of a punitive damage award.

A. Dillard's Belated Attack On The Procedures Employed Below Is Wholly Without Merit.

When reviewing challenges to punitive damage awards rendered in state courts, this Court has repeatedly acknowledged that if "fair procedures were followed, a judgment that is the product of that process is entitled to a strong presumption of validity. . . . " *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993) (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22-40 (1991)

(Scalia, J., concurring in judgment)); *BMW*, 517 U.S. at 586-87 (Breyer, J., concurring). Though Dillard's petition makes new-found objections to the procedures employed below, it cannot overcome the judgment's "strong presumption of validity."

1. Legislative Enactments

In 1989, the Nevada legislature enacted statutory provisions governing the guidelines and procedures for imposing punitive damages in Nevada. NEV. REV. STAT. § 42.005. These provisions include a variety of measures to curtail punitive damage awards. For example, with certain exceptions not relevant here, punitive damage awards are capped at three times compensatory damages if they equal $100,000 or more, and at $300,000 if the compensatory damages are less than $100,000; trials must be bifurcated with separate proceedings for a punitive damages determination; and evidence of the defendant's financial condition is not admissible until commencement of the separate proceeding. NEV. REV. STAT. § 42.005(1)(a), (3)-(4). In 1995, the Nevada legislature further refined this area by establishing uniform definitions for the terms "conscious disregard," "fraud," "malice, express or implied," and "oppression." NEV. REV. STAT. 42.001.

Members of this Court have repeatedly recognized the procedural safeguards provided by such enactments, *see BMW*, 517 U.S. at 595 (Breyer, J., concurring); *id.* at 613-614 (Ginsburg, J., dissenting) (Appendix); *TXO*, 509 U.S. at 472 (Scalia, J., concurring in judgment), and there is no question they were adhered to in the case below. The district court bifurcated the trial, and the punitive damage jury instructions given at the conclusion of the first phase were taken directly from NEV. REV. STAT.

§§ 42.001; 42.005. Resp. App. 1a-3a. Beckwith's counsel was not permitted to introduce evidence of Dillard's wealth until the subsequent proceeding on punitive damages, and the district court, upon Dillard's request and without objection from Beckwith, reduced the award by more than 55% when the jury's verdict exceeded three times the compensatory damages previously awarded.

Obviously unable to grapple with the safeguards provided by Nevada's statutory scheme, Dillard simply declares in a single footnote that the award is still unconstitutional under *BMW*. Pet. 15 n. 3. Predictably, Dillard provides no legal authority or analysis to support its conclusory arguments. *Id.*

2. The Jury Instructions

The jury instructions given in this case provided more protection than those previously at issue in cases before this Court. The punitive damage jury instructions given in the first phase of trial were directly based on Nevada statutes and, unlike the instruction at issue in *TXO*, 509 U.S. at 464 n. 29, required punitive damages (i.e., malice or oppression, as defined) to be proven by the heightened standard of clear and convincing evidence. Resp. App. 1a-2a. In the second phase, the district court gave 11 additional instructions to assist the jury in making a fair decision. 2 AA 354-65.

The second set of instructions provided specific standards to guide the jury's discretion when determining the amount of the award, including consideration of: (1) deterrence and punishment; (2) culpability and blameworthiness of the conduct; (3) vulnerability and the injury suffered by the injured party; (4) offensiveness of the conduct when compared to societal values; (5) the

reasonable relationship between the amount of punitive damages and the harm that had already occurred; (6) the reprehensibility of Dillard's conduct considering the whole record; (7) mitigating factors; and, (8) the financial condition of the defendant. *Id.* These instructions were more detailed than those approved by the majority in *Haslip*, 499 U.S. at 19-20, and closely resemble the "*Green Oil* factors" that Justice O'Connor suggested would be a better guide for Alabama juries in that case. *Id.* at 51-52 (O'Connor, J., dissenting).

While the instructions here allowed the jury to consider Dillard's net worth, this instruction was permissive in nature and was only given after instruction on the other factors. 2 AA 363. The district court also instructed the jury that it could not award punitive damages against Dillard simply because it was "big business," 2 AA 357, and no instruction contained the troubling references to "additional compensation," requiring "a larger fine upon one of larger means." *TXO*, 509 U.S. at 490-91 (O'Connor, J., dissenting), or to the award being "entirely discretionary with the jury." *Haslip*, 499 U.S. at 6 n. 1. Because Dillard never objected to a single punitive damage instruction that was given to the jury, its new-found objection to the net worth instruction is barred under Nevada law. *See Wagon Wheel Saloon & Gambling Hall, Inc. v. Mavrogan*, 369 P.2d 688 (Nev. 1962); Nev.R.Civ.P. 51.[3]

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[3] Dillard's tardy objections to Beckwith's counsel's closing argument are also time-barred. *Beccard v. Nevada National Bank*, 657 P.2d 1154, 1156 (Nev. 1983) ("failure to object to allegedly prejudicial remarks at the time argument is made . . . strongly indicates that party . . . did not consider the arguments objectionable at the time they were delivered, but made the claim as an afterthought.").

3. Postverdict Review

Dillard filed a 16-page motion for judgment notwithstanding the verdict and an 18-page reply. Dillard never mentioned "*BMW*", "due process," the "Fourteenth Amendment," the "Commerce Clause," or the "Federal Constitution." Instead, Dillard's only challenge to the punitive damage verdict was that it must be reduced pursuant to NEV. REV. STAT. § 42.005(1)(a). After conducting a lengthy hearing where Dillard's counsel had "an opportunity to say anything they want[ed] to say," 10/30/97 Tr. 3, the district court reduced the punitive damage award by over 55% to comply with the Nevada statute. Dillard never presented any federal claim regarding the punitive damage award.

In its briefs before the Nevada Supreme Court, Dillard made passing references to *BMW* for the sole proposition that it was improper for the jury to consider a company's nationwide net worth when assessing punitive damages. Appellant's Opening Br. 22-23; Appellant's Reply Br. 15-16. The Nevada Supreme Court rejected Dillard's argument, basing its decision on state grounds that had long allowed the consideration of a company's net worth as one of many factors when assessing punitive damages. App. 9a-10a (citing *Ainsworth v. Combined Ins. Co.*, 763 P.2d 673 (Nev. 1988)). The Nevada Supreme Court did not perform an excessiveness analysis under *BMW* because Dillard never presented such a claim.

The lack of a *BMW* analysis does not, however, support Dillard's baseless contention that Nevada leaves evaluation of punitive damage awards "solely to the 'unreviewable discretion of the jury,' " Pet. 14, thereby denying due process to corporate defendants. Pet. 15. First, the foregoing language that Dillard placed in quotes

at page 14 of its petition is not found anywhere in the Nevada Supreme Court's opinion. App. 9a-10a. Second, Dillard could have asked the Nevada Supreme Court to review the award for excessiveness under *BMW* or state law since "[e]very [ ] State in the Union affords postverdict judicial review of the amount of a punitive damages award. . . . " *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 427-28 (1994). This is certainly true in Nevada where its highest court has not hesitated to review and reduce punitive damage awards against corporate defendants under standards entirely consistent with those articulated in *BMW*. *See, e.g., Wholers v. Bartgis*, 969 P.2d 949, 961-62 (Nev. 1998) (where award was disproportionate to degree of defendants' reprehensibility and blameworthiness, punitive damage award against nationwide insurer and its administrator reduced from $7.5 million to $3.75 million and from $500,000 to $150,000, respectively, despite one defendant's net worth of $300 million); *Guaranty Nat'l Ins. Co. v. Potter*, 912 P.2d 267, 273 (Nev. 1996) (punitive damage award against nationwide insurer reduced as excessive punishment from $1 million to $250,000 despite defendant's net worth exceeding $100 million); *Republic Insurance v. Hires*, 810 P.2d 790, 793 (Nev. 1991) (punitive damage award against nationwide insurer with net worth exceeding $170 million reduced from $22.5 million to $5 million as excessive of the amount needed to deter given the degree of blameworthiness and harmfulness of defendant's conduct).

The Nevada Rules of Appellate Procedure provide an aggrieved party with the opportunity to petition the Nevada Supreme Court for rehearing when the court has purportedly overlooked or failed to consider controlling authority. Nev.R.App.P. 40(a). Though Dillard filed a 10-

page petition for rehearing, it never challenged the Nevada Supreme Court's ruling on the punitive damage award. Resp. App. 10a-25a. When a party fails to avail itself of procedural safeguards, it has no basis to later complain that it was denied due process. *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 38-39 n. 21 (1990). That is exactly what Dillard has done here; it cannot overcome the judgment's "strong presumption of validity."

B. The State Courts' Continued Use Of Wealth As An Additional Common Law Factor To Measure Deterrence Does Not Present A Question Worthy Of Review.

Dillard's claim that *BMW* prohibits the states from considering factors other than *BMW's* three guideposts when reviewing a punitive damage award for excessiveness is flatly wrong. The lower courts are not in conflict on this question, and this issue is not important, substantial or recurring.

1. Neither The Fourteenth Amendment Nor *BMW* Prohibits States From Allowing Juries And Courts To Consider A Defendant's Wealth When Determining The Propriety Of A Punitive Damage Award.

BMW affirmed that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition" and that "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." 517 U.S. at 568. Nevada, like the vast majority

of states that have considered the issue, has determined that a defendant's wealth is an appropriate consideration when determining the propriety of a punitive damage award. *Annotation, Punitive Damages: Relationship to Defendant's Wealth As Factor in Determining Propriety of Award,* 87 A.L.R.4th 141 (1991) (collecting cases). This state practice is consistent with views espoused in legal treatises and commentaries, *see, e.g.*, RESTATEMENT (SECOND) OF TORTS § 908(2) (1977); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 15 (5th ed. 1984); 1 JAMES D. GHIARDI, PUNITIVE DAMAGES LAW AND PRACTICE § 5.36 (1985), and has been historically approved by this Court, provided it is not the sole basis for assessing or upholding an award. *BMW,* 517 U.S. at 591 (Breyer, J., concurring); *TXO,* 509 U.S. at 462, and n. 28 (plurality opinion); *id.* at 491-92 (O'Connor, J., dissenting); *Haslip,* 499 U.S. at 21-22.

Nothing in *BMW* renounced the near universal principle that "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded." *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 270 (1981). Nor does *BMW* preclude courts from considering a defendant's wealth when reviewing punitive damage awards for excessiveness. Instead, the majority in *BMW* created three "guideposts" to ensure "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574-75.

Even though Dillard never properly presented the issue, there is no question it received adequate notice in the case below. Longstanding Nevada law made clear that punitive damages could be imposed against Dillard for constructively discharging Beckwith in violation of

public policy, *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984); *Martin v. Sears, Roebuck and Co.*, 899 P.2d 551 (Nev. 1995), and intentionally inflicting emotional distress upon her. *Ramada Inns, Inc. v. Sharp*, 711 P.2d 1 (Nev. 1985); *Shoen v. Amerco, Inc.*, 896 P.2d 469 (Nev. 1995). Further, Nevada law put Dillard on notice that punitive damages equal to three times the amount of compensatory damages could be awarded if the latter exceeded $100,000. NEV. REV. STAT. § 42.005(1)(a). And Dillard had notice of the amount of compensatory damages being sought by Beckwith, conceded the accuracy of that amount, and advised the jury that it was "not going to argue the numbers." Respondent's Answering Br. 17. Even now, Dillard has *never* challenged the award here under any of *BMW's* guideposts.

The word "guidepost" indicates the majority's framework is a guide only, not an exclusive formula. As the dissenting opinion summarizes, "the Court nowhere says that these three 'guideposts' are the only guideposts; indeed it makes very clear that they are not – explaining away the earlier opinions that do not really follow these 'guideposts' on the basis of additional factors, thereby 'reiterat[ing] our rejection of a categorical approach.' " *BMW*, 517 U.S. at 606 (Scalia, J., dissenting). Similarly, the concurring Opinion discusses Alabama's consideration of the defendant's financial condition, and concludes that "since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State's interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its response to economic incentives)." *Id.* at 591 (Breyer, J., concurring). After acknowledging that this

factor may inflate awards when the defendant is wealthy, the concurring Opinion nonetheless concludes that "does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of the other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." *Id.*

The foregoing reasoning echoes this Court's previous findings that "under well-settled law," factors such as evidence of a defendant's impressive net worth "are typically considered in assessing punitive damages." *TXO*, 509 U.S. at 462 n. 28 (citing *Haslip*, 499 U.S. at 21-22). Even the four dissenting Justices in *TXO* conceded that consideration of a defendant's wealth was not unconstitutional and that this factor was long thought to be relevant. *Id.* at 491-92 (O'Connor, J., dissenting). The teaching of these cases is that "the factfinder must be guided by more than just the defendant's net worth." *Haslip*, 499 U.S. at 22. Here, the district court followed this admonition by instructing the jury on numerous factors besides Dillard's wealth. Dillard conceded that its wealth was relevant, objecting only to the scope of this inquiry. On appeal, the only question even remotely presented on this subject was whether the jury could consider Dillard's nationwide net worth when assessing punitive damages, and the Nevada Supreme Court answered in the affirmative, basing its decision on longstanding state common law.

This Court has consistently approved the common law method for assessing punitive damages, noting that it would need a "strong case" for the Fourteenth Amendment to affect something that has been practiced by common consent for over two hundred years. *Haslip*, 499 U.S. at 15-17. The instant matter is no such case, particularly

when one considers Dillard's repeated failure to properly present an excessiveness claim below, Nevada's extensive legislative enactments, the detailed nature of the jury instructions, Dillard's repeated failure to avail itself of procedural safeguards during postverdict review, and the comparatively small amount of the remitted punitive damage award here vis-à-vis the unrelated awards that Dillard cites in a transparent attempt to "jar [the Court's] constitutional sensibilities" (*e.g.*, $1.87 million vs. $1.09 billion, $290 million, and $250 million, Pet. 10). *Id.* at 18. Put simply, the judgment in this matter does not violate due process merely because Beckwith introduced evidence of Dillard's net worth.

2. There Is No Irreconcilable Conflict In the Cases Interpreting *BMW*.

To obtain certiorari, Dillard must demonstrate a real or intolerable conflict in the law on an important question of federal law that is irreconcilable, and not subject to a permissible difference of opinion by the state courts. ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE §§ 4.3; 4.4 (6th ed. 1986). Dillard suggests that numerous courts are using a defendant's wealth to "trump the constitutional analysis mandated by *BMW*" or as a "proxy" for a "proper" analysis under *BMW*. Pet. 15-20. Again, it must be stressed that Dillard never presented this claim to the Nevada Supreme Court. At best, Dillard argued solely that it was improper *for the jury* to consider a defendant's wealth when assessing punitive damages. When given the opportunity to present the question of whether a reviewing court may consider a defendant's wealth as part of an excessiveness analysis, Dillard filed a petition

for rehearing that was conspicuously silent on this issue. Resp. App. 10a-25a.

In any event, the vast majority of state and federal cases faithfully apply *BMW's* guideposts – when a claim is properly presented – to determine whether a punitive judgment is excessive. Those cases also review a number of other common law factors, including economic wealth, when making this determination. That the lower courts do not limit their analysis to *BMW* does not, however, represent a conflict with this Court's precedent. Instead, courts addressing the excessiveness question continue to apply both federal and state factors, and make a dual analysis under both state common law and federal due process principles. While lower courts may differ in the emphasis they place on a defendant's financial condition, any difference simply reflects the unique history of each state's common law, a uniqueness that is inherent in our dual system of government.

3. This Issue Is Not Important, Substantial Or Recurring.

In a final plea to have this Court grant certiorari, Dillard rolls out additional constitutional artillery, citing a string of cases for the propositions that (i) punishment based solely on status violates the Equal Protection Clause and the Eighth Amendment's prohibition against cruel and unusual punishment, and (ii) a state's attempt to impose taxes outside its borders violates the Commerce Clause. Pet. 21-23.[4] Of course, neither scenario is present here nor were such claims presented below.

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[4] Notably, in the context of the Eighth Amendment's Excessive Fines Clause, Justice O'Connor rejected the argument

Dillard is not being punished for having wealth outside of Nevada: it is being punished for its culpable behavior within the State. Having engaged in that intentional conduct, Dillard is not afforded immunity because it chooses to operate nationwide. Rather, Dillard must be treated the same as all corporations, including those engaged solely in intrastate operations. If the Court were to accept the rationale Dillard posits, multi-state companies would be able to dilute any one state's ability to assess a deterrent award to protect its own interests. *BMW* never intended to shield non-resident corporations from their own wrongdoing simply because of their non-resident status. To the contrary, *BMW* reaffirmed that evidence of improper out-of-state transactions is still "relevant to the determination of the degree of reprehensibility of the defendant's conduct." 517 U.S. at 574 n. 21 (citing *TXO*, 509 U.S. at 462 n. 28).

In the end, Dillard's petition is simply an afterthought manufactured by Dillard's new counsel and filled with recycled arguments from Ford's recently unsuccessful petition. Those recycled arguments cannot, however, rescue Dillard from its repeated procedural failings below. Nor can Dillard's primary focus on inapposite and extreme punitive damages cases justify certiorari review given this Court's observation that "[b]ecause no two cases are truly identical, meaningful comparisons of

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that wealth of a defendant should not be taken into account when assessing the amount of a punitive damage award, characterizing the argument "as a historical matter, . . . weak indeed." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part) (citing Magna Carta and Blackstone, Commentaries).

such awards are difficult to make." *TXO*, 509 U.S. at 457. This is especially true here given the facts of the instant case, the amount of the remitted award, and the extensive procedural safeguards provided by Nevada's legislature and its courts.

CONCLUSION

The petition should be denied in all respects.

Respectfully submitted this 2nd day of June, 2000.

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DISTRICT COURT

CLARK COUNTY, NEVADA

DELORIS BECKWITH Plaintiff, vs. DILLARD DEPARTMENT STORES, INC., a Delaware Corporation; DILLARD'S NEVADA, INC., a Nevada Corporation; MARIA ROKOVITZ, an individual; and DOES I through X, inclusive, Defendants.	)	CASE NO: A364772 DEPT NO: VII DOCKET: P

JURY INSTRUCTIONS

* * *

INSTRUCTION NO. 53

If you find defendant Dillard's liable for tortious constructive discharge in violation of public policy or any defendant liable for intentional infliction of emotional distress, then you are to determine whether there should also be an award for damages by way of example and punishment, which are called "punitive damages," against any of those found liable.

For an award of punitive damages to be authorized, you must first find, by clear and convincing evidence, that the defendants have been guilty of oppression, fraud or malice, express or implied, as will be explained.

If you make a finding on your verdict form that punitive damages will be assessed, you will be asked to deliberate again at a time convenient to the Court and the Jury for purposes of assessing the amount of such damages.

INSTRUCTION NO. 54

The plaintiff has the burden of proving by clear and convincing evidence all of the facts necessary to establish her entitlement to punitive damages.

"Clear and convincing" evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence.

You should consider all of the evidence bearing upon every issue regardless of who produced it.

INSTRUCTION NO. 55

"Oppression" means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.

In turn, "conscious disregard" means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid these consequences.

INSTRUCTION NO. 56

"Malice, express or implied" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.

Again, "conscious disregard" means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid these consequences.

INSTRUCTION NO. 61

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberations by the evidence as you understand it and remember it to be and by the law as given you in these instructions, and return a verdict

which, according to your reason and candid judgment, is just and proper.

GIVEN this 16 day of September, 1997

/s/ Mark Gibbons
DISTRICT JUDGE
MARK GIBBONS

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SUPREME COURT OF THE STATE OF NEVADA

DILLARD'S, INC., a Delaware Corporation, formerly known as DILLARD DEPARTMENT STORES, INC., Appellant, vs. DELORIS BECKWITH, Respondent.	**SUPREME COURT NO. 31378** District Court Case No. A364772

MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION FOR STAY OF REMITTITUR PENDING APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI

COMES NOW, Dillard's, Inc. ("Dillard's"), by and through its counsel, John Peter Lee, Ltd. and files this Motion for Leave to File Reply in Support of Motion for Stay of Remittitur Pending Application to the Supreme Court of the United States for a Writ of Certiorari.

Dillard's requests the Court to enter an order granting Dillard's leave pursuant to N.R.A.P. 27(a) to file a

Reply in Support of Dillard's Motion for Stay of Remittitur Pending Application to the Supreme Court of the United States for a Writ of Certiorari.

In Beckwith's Response dated January 24, 2000, Beckwith makes two invalid arguments. First, Beckwith argues Dillard's Petition for Rehearing to be an improper re-argument of matters presented in Dillard's Opening and Reply Briefs under N.R.A.P. 40(c). Dillard's argues in its Petition for Rehearing that the Court overlooked the material fact of Beckwith's admission that she was not willing to accept reasonably comparable employment or even virtually identical employment because she was not willing to accept any employment. Her attorney required her to be at his "beckon call" for the litigation, and she "couldn't take a job and be off all those hours". 1 Appellant's Appendix, Vol. 4. Dillard's properly provides in its Petition for Rehearing the citations to its brief and to the record as required by N.R.A.P. 40(a).

Additionally, Dillard's provides argument authorized under N.R.A.P. 40(a) concerning the Court's Opinion rendered December 13, 1999 concerning material issues of law overlooked by the Court. Contrary to Beckwith's assertion, Dillard's does not re-argue its brief but argues the grounds for rehearing and provides citations to the brief for the pertinent, original arguments as the Rule requires.

Dillard's Petition for Rehearing is proper under N.R.A.P. 40, and Dillard's Motion for Stay is proper under N.R.A.P. 41. Beckwith acknowledges that her January 24, 2000 Response is not the proper form to address Dillard's

Petition for Rehearing, but Beckwith nonetheless proceeds to attack the Petition, knowing that its attack is improper. See Beckwith's Response, page 1, lines 22 through 26.

Second, Beckwith invalidly argues that Dillard's has a fundamental misunderstanding of *BMW of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed. 2d 809 (1996). On January 19, 2000, Ford Motor Company saw fit to file in the Supreme Court of the United States a Petition for Writ of Certiorari on exactly the same grounds as Dillard's discusses in its Motion for Stay. In its Petition, Ford's counsel states:

> State courts have been engaging in the same misuse of wealth as a proxy for a proper analysis of constitutional excessiveness under *BMW*. In *Dillard Department Stores, Inc. v. Beckwith*, 989 P.2d 882 (Nev. 1999), for instance, the Nevada Supreme Court recently upheld a punitive damage award of $1.87 million, rejecting the defendant's argument that premising the punishment on its "nationwide worth," violated *BMW's* limits on extraterritorial punishments. L.2 (excerpts from appellant's briefs in *Dillard*). In response, the Nevada Supreme Court failed even to mention *BMW*, and instead noted the "subjective nature of punitive damages and the absence of workable standards by which to evaluate the propriety of such an award." 989 P.2d at 887. The court expressly approved of the trial court's reliance on the defendant's "nationwide worth," and simply declared: "The award will not financially destroy or annihilate Dillard. Therefore, the punitive damage award is affirmed." *Id.* at 888.

Ford Motor Company cited this Court's December 13, 1999 Opinion as pertinent to the Supreme Court's consideration of Ford's Petition for Certiorari. A copy of Ford's Petition for Writ of Certiorari is attached hereto as Exhibit "1".

Beckwith's citation in its January 24, 2000 Response of a federal district court case from Kansas hardly "dooms any petition [Dillard's] ultimately files." Beckwith's Response, page 2, lines 4 through 13. Not only is Beckwith mistaken about *BMW* being allegedly irrelevant, but the issue is one of national, constitutional significance.

CONCLUSION

Beckwith admits to improperly addressing Dillard's Petition for Rehearing in Beckwith's January 24, 2000 Response. Dillard's has properly identified misapprehensions of fact and misapprehensions of material questions of law by the Court in Dillard's Petition for Rehearing. Dillard's has also correctly understood the constitutional significance of the *BMW* Opinion.

Dillard's requests the Court to enter an order granting Dillard's leave pursuant to N.R.A.P. 27(a) to file a Reply in Support of its Motion for Stay of Remittitur Pending Application to the Supreme Court of the United States for a Writ of Certiorari.

DATED this 28 day of January, 2000.

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SUPREME COURT OF THE STATE OF NEVADA

DILLARD DEPARTMENT STORES, INC., A DELAWARE CORPORATION; AND DILLARD'S NEVADA, INC., A NEVADA CORPORATION, Appellant, vs. DELORIS BECKWITH, Respondent.	**SUPREME COURT NO. 31378** On Appeal From the Eighth Judicial District Court Case No. A364772

PETITION FOR REHEARING

Pursuant to N.R.A.P. 40, Appellant Dillard Department Stores, Inc., a Delaware corporation and Dillard's Nevada, Inc., a Nevada corporation (together "Dillards") hereby petitions the Court for rehearing. Dillards files this petition because the Court has overlooked or misapprehended a material fact in the record and because the Court has overlooked or misapprehended a material question of law in its December 13, 1999 Opinion herein.

I. THE COURT OVERLOOKED AN IMPORTANT FACT AND PERTINENT AUTHORITIES CITED BY DILLARDS WHICH SHOW BECKWITH'S FAILURE TO MITIGATE.

In the Court's discussion of compensatory damages and the jury instructions on mitigation of damages, the Court overlooked the fact that Respondent Deloris Beckwith stopped looking for work because she chose to keep

all her time available to pursue litigation. The admission by Beckwith was plain and unequivocal. She stated:

> I was so busy, back and forth with this lawsuit and I was at Mr. Campbell's beckon call and I couldn't take a job and be off all those hours.

Transcript, Thursday, August 28, 1997, p. 99, l Appellant's Appendix 164. This was a highly material, indeed ordinarily dispositive, admission by Beckwith, but the Court did not address or mention this fact in its December 13, 1999 Opinion. Nowhere in the facts of the Opinion or in the legal analysis is Ms. Beckwith's statement, quoted above, considered. The Court appears to have overlooked or misapprehended this fact.

Concerning the applicable law, none of the cases cited by the Court or by any of the parties holds that the requirement of mitigation of damages is met by a plaintiff spending full time working on ligitation. In observing the definition of "substantially equivalent employment" used by the trial court below from the case, *Sellers v. Delgado College*, 902 F.2d 1189, 1193 (5th Cir. 1990), this Court stated at footnote 1 of the December 13, 1999 Opinion herein that trial courts should not use the *Sellers* instruction, which the trial court used in this case. In determining the error in usage of the *Sellers* instruction to be harmless, the Court focused upon a comparison of the terms, "substantial [sic] equivalent" and "reasonable alternative".

The Court does not include in its Opinion a discussion of the holding of *Sellers*. The employee-claimant in *Sellers* was not entitled to back-pay for the six-month

period when she filed no job applications. 902 F.2d at 1196.

Dillards cited *Sellers* in its Opening Brief at page 21, lines 23 and 24 as an example of one of the many courts which require actual mitigation efforts rather than the type of full-time litigation efforts Beckwith admitted to have pursued. This Court also overlooked in its December 13, 1999 Opinion the legal authorities Dillards cited on page 21, lines 12 through 27, which also require actual efforts at finding comparable employment. These authorities, which this Court overlooked in its December 13, 1999 Opinion are: *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 231 (1982), *Odima v. Westin Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1995), *Sias v. City Demonstration Agency*, 588 F.2d 692, 697 (9th Cir. 1978) and *Payne v. Security Savings and Loan Ass'n*, 924 F.2d 109 (7th Cir. 1991).

Each of these cases cited by Dillards requires efforts to mitigate damages through actual seeking of comparable employment. None of these cases authorizes a terminated employee to mitigate damages through full-time pursuit of litigation. Dillards specifically quoted *Sias, supra*, as requiring more than "minimal efforts to mitigate damages by seeking other comparable employment and [more than the employee's devotion of] time and talents to the furtherance of the instant lawsuit." 588 F.2d at 697. Dillards' Opening Brief, p. 21, ll, 16, 17. In its December 13, 1999 Opinion, the Court overlooked all of these authorities Dillards cited from the Supreme Court of the United States and from the United States Circuit Courts of Appeals for the Ninth Circuit, the Seventh Circuit and the Fifth Circuit.

Dillards also argued in the same paragraph of the Opening Brief that Nevada's mitigation case, *Beales v. Hillhaven, Inc.*, 108 Nev. 96, 825 P.2d 212 (1992), is consistent with all of these federal cases in requiring willingness to accept comparable employment as an element of mitigation. Opening Brief, page 21, line 26. Indeed, Dillards' counsel has found no case throughout the United States setting a standard for mitigation of damages which allows a plaintiff employee to reserve her full-time availability for working on litigation rather than for seeking comparable employment as the position lost.

Although in its December 13, 1999 Opinion the Court discusses *Beales* and the fact there found that the plaintiff could not find employment in her field, the Court's analysis of *Beales* in its December 13, 1999 Opinion focuses upon the comparison of the *Beales* jury instruction to *Sellers, supra,* and to *Southern Pacific Transportation Co. v. Fitzgerald,* 94 Nev. 241, 243 577 P.2d 1234, 1235 (1978). December 13, 1999 Opinion, pp. 8, 9. The Court has overlooked or misapprehended the fact that Beckwith here chose to commit herself full-time to her litigation rather than to seeking employment. By no means does *Beales* conclude that full-time litigation efforts suffices to mitigate damages.

In *Beales,* the Court's comment that the plaintiff could not find other employment was part of a discussion of future damages, not of mitigation of damages. 108 Nev. at 101-02, 825 P.2d 215-16. In the December 13, 1999 Opinion, the Court did not address this aspect of *Beales* or its similarity to the federal cases Dillards cited for the standard of willingness to accept comparable employment, which standard courts uniformly include to satisfy the

requirement of mitigation of damages. Dillards is aware of no case holding that a party can simply present evidence of probability or improbably of finding comparable employment as a substitute for actual diligence in seeking comparable employment and as a substitute to accept comparable employment and as a substitute for *willingness* to accept employment to fulfill the requirement of mitigation of damages. In its December 13, 1999 Opinion, the Court overlooked the fact that Beckwith was unwilling to accept comparable employment, according to her own testimony, that she "couldn't take a job and be off all those hours" because she "was so busy back and forth with this lawsuit" at their attorney's "beckon call". (1 Appellant's Appendix 164 and Appellant's Opening Brief, pages 20, 21.)

The Court observed in its December 13, 1999 Opinion on page 10 that in *United Ass'n Journeyman v. Stine*, 76 Nev. 189, 218, 351 P.2d 965, 980-81 (1960), that this Court has stated that it cannot review a jury question where the proper standard for mitigation is stated. The Court also acknowledged in its December 13, 1999 Opinion on page 9 at footnote 1 that the trial court's instruction below on mitigation was not correct, although the Court considered it harmless error. Were it not for Beckwith's admission that she did not diligently seek comparable employment but chose instead to spend her full-time efforts on litigation, the Court's conclusion that the error was harmless might have been valid. Because the Court overlooked this fact, however, Dillards is prejudiced by the instruction, which unfairly placed the burden upon Dillards to show that a virtually identical job was available. It would not have mattered whether the job was equivalent, subject to

competitive interviewing or offered to her outright. Dillards is prejudiced because, as Beckwith testified, she was not willing to take a job.

In citing *Stine* in its December 13, 1999 Opinion, the Court assumed the jury instruction to be correct. In *Stine*, no admission of full-time effort toward litigation rather than seeking employment existed, however. Also, *Stine* did not contain an erroneous instruction on mitigation. In its reliance upon *Stine* in its December 13, 1999 Opinion, this Court overlooked the fact of Beckwith's choice to pursue litigation rather than employment. As stated above, the Court also overlooked the cases Dillards cited on mitigation in its Opening Brief.

The Court appears to have held that the instruction on mitigation offered by Dillards from *Southwest Trans. Co. v. Fitzgerald*, 94 Nev. 241, 577 P.2d 1234 (1978), was not necessary because *Fitzgerald* was a personal injury case. While it may not have been necessary to use an instruction from a personal injury action, the Court does not address the federal mitigation cases cited by Dillards hereinabove and on page 21 of Dillards' Opening Brief, which are consistent with the Nevada cases of *Fitzgerald, supra*, and *Beales, supra*.

Instead, the Court also states in its December 13, 1999 Opinion that under *Stine* a jury verdict on mitigation cannot be reviewed if the instruction on mitigation is correct. The Court acknowledges in its December 13, 1999 Opinion on page 9, footnote 1, that the *Seller* instruction was in error. Because the premise of *Stine* assumes a correct jury instruction, the holding of *Stine* does not apply to this case. Again, the Court's reliance upon *Stine*

overlooks Beckwith's admitted unwillingness and inability to take a job which would take her away from litigation of her multi-million dollar claim. Dillards' authorities, also overlooked by the Court, would disallow such litigation efforts as a substitute for mitigation of damages.

Dillards made similar arguments concerning the misstatement of a duty in a jury instruction as being generally grounds for reversal under *Mizushima v. Sunset Ranch, Inc.*, 103 Nev. 259, 266, 737 P.2d 1158, 1162 (1987) and *Stevens v. Duxbury*, 97 Nev. 517, 634 P.2d 1212 (1981). Dillards' Opening Brief, p. 12 and Dillards' Reply brief, pp. 1, 2, 4, 7, 8, 11, 14, 16, 17 and 20. The Court also overlooked these authorities in its December 13, 1999 Opinion.

Although the Court did not miscite any authorities, the Court did overlook Dillards' authorities on mitigation and on jury instructions on legal duty, and the Court did not include them in its discussion in the December 13, 1999 Opinion. These authorities are particularly important because of Beckwith's admission that she stopped looking for work so that she could work full-time on the litigation. Dillards requests rehearing pursuant to NRAP 40 in light of this important fact and in light of these important authorities which the Court overlooked concerning Beckwith's failure to mitigate her damages.

II. THE COURT OVERLOOKED THE *FALLINE* CASE CITED BY DILLARDS BOTH AS TO THE TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND AS TO PUNITIVE DAMAGES AS BEING UNAVAILABLE IN THE *WORKERS COMPENSATION SETTING*.

On pages 16 and 17 of the Opening Brief, Dillards argued that this Court's statements in *Valline v. G.N.L.V. Corp.*, 107 Nev. 1004, 823 P.2d 888 (1991), mean that emotional distress damages and punitive damages are unavailable in the workers compensation setting. Dillards quoted the following language from *Falline*:

> Appellants also contend that the district court erred in dismissing their cause of action for intentional infliction of emotional distress. We disagree. The synonym for this particular cause of action is the tort of outrage. We have previously held, in *Star v. Rabello*, 97 Nev. 124, 625 Pl.2d 90 (1981), that one of the elements of this tort is extreme and outrageous conduct. *Id.* at 125, 625 P.2d at 91-92. Moreover, we have inferred that "malicious intent" is a descriptive aspect of the tort of outrage. See *Branda v. Stanford*, 97 Nev. 643, 648, 637 P.2d 1223, 1227 (1981). In short, this particular tort would, at least in many instances, embrace conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case. *Moreover, recognizing a cause of action for emotional distress in the workmen's compensation context raises the specter of "almost every emotion-based case turning up as some kind of tort suit."* 2A A, Larson, The Law of Workmen's Compensation § 68.34(a) at 13-116 (1987 & Supp. 1990).

> Finally, *the Legislature has established the degree to which self-insurers should be punished for conduct of the type here present by imposing administrative fines in specific maximum amounts.*

Falline at 1013, 823 P.2d at 894 (emphasis added). This Court thereby affirmed in *Falline* the lower court's dismissal of the claim for intentional infliction of emotional distress based upon the alleged violation of the workers compensation statutes.

In its December 13, 1999 Opinion, the Court relied upon *Shoen v. Americo, Inc.*, 111 Nev. 735, 896 P.2d 469 (1995) for the proposition that the tort of intentional infliction of emotional distress can exist in an employment termination context. The Court overlooked Dillards' quoted authority from *Falline*, however.

The Court's overlooking of *Falline* is a material question of law because *Falline* was actually a workers compensation case whereas *Shoen* was not. The emotional distress claim was allowed in *Shoen* at least in part because a physical assault occurred against the plaintiff, a fact which is very distinguishable from the instant case. 111 Nev. at 747, 896 P.2d at 477. Indeed, in *Shoen* the Court dismissed a tortious discharge claim because of the availability of a statutory remedy under NRS 50.070. 111 Nev. at 744-45, 896 P.2d at 474-75. While it is technically true that *Shoen* allowed a tort claim for an intentional infliction of emotional distress in an employment setting, *Shoen* did not allow a tortious discharge claim where an alternative statutory remedy was available. Also, *Shoen* was not a workers compensation case.

In its December 13, 1999 Opinion, the Court overlooked the more pertinent authority of *Falline* to the workers compensation setting. It remains unclear whether the Court intends by its December 13, 1999 Opinion to overrule *Falline*. The Opinion overlooks *Falline* and does not mention it.

Additionally, the Court overlooked Dillards' citation of *Village Development Co. v. Filice*, 90 Nev. 305, 310, 526 P.2d 83, 86 (1974), for the proposition that a principal employer cannot be held liable on the basis of its agents' conduct where the agent is held not liable. Dillards made this argument on pages 17 and 18 of its Opening Brief. In its December 13, 1999 Opinion, the Court overlooked the fact that the jury absolved Dillards' agent, Defendant Maria Rokovitz, but found Dillards liable in direct contradiction to this Court's holding in *Filice*. Pursuant to NRAP 40, Dillards requests rehearing because the Court has overlooked material questions of law raised by Dillards under *Falline* and under *Filice*.

III. THE COURT OVERLOOKED MATERIAL QUESTIONS OF LAW RAISED BY DILLARDS CONCERNING HOW SELF-INSURED EMPLOYERS SHOULD APPLY THE PRIORITIES OF N.R.S. 616C.530 WITHIN THE CONTEXT OF THE WORKERS COMPENSATION STATUTORY SCHEME WHERE AN INJURED WORKER IS REPLACED *DURING HER ABSENCE*.

The Court acknowledges in its December 13, 1999 Opinion at page 5 that N.R.S. 616D.030 precludes private claims under the workers compensation statutes. The Court quoted Subsections 1 and 2 of the statute, which so

provide. Also on page 5 of its Opinion, the Court acknowledges that the statutory scheme applies only to administration of the act. In focusing upon Dillard's argument that the use of N.R.S 616C.510 created strict liability, the Court overlooked Subsections 2 through 4 of N.R.S. 616C.530.

NRS. 616C.530 states:

> **NRS 616C.530 Priorities for returning injured employee to work.** An insurer shall adhere to the following priorities in returning an injured employee to work:
>
> 1. Return the injured employee to the job he had before his injury.
>
> 2. Return the injured employee to a job with the employer he worked for before his accident that accommodates any limitation imposed by his injury.
>
> 3. Return the injured employee to employment with another employer in a job that uses his existing skills.
>
> 4. Provide training for the injured employee while he is working in another vocation.
>
> 5. Provide formal training or education for the injured employee in another vocation.

The statute plainly contemplates that injured employees may have been replaced while absent and that other "priorities" were also to be utilized. In its December 13, 1999 Opinion, the Court overlooked the other priorities set forth in the statute. Dillards argued that the selection of these priorities involves an analysis of the contact of

the factual setting within the overall statute. Dillards Opening Brief, pages 12 through 13.

The Court also overlooked the fact that the jury instruction used by the trial court below only referred to the first of the five priorities, which is to return the injured employee to the job he had before his injury. 2 Appellant's Appendix, 317. The Court overlooked the context of Subsection 1 within the overall statute and the overall statutory scheme.

Justice Maupin correctly noted in his concurring opinion that N.R.S. 616C.530 applies to workers compensation *insurers* and that the priorities do not govern an employer's re-assimilation of an injured worker to the work place. Justice Maupin states that the instruction was couched in terms of a specific duty that did not apply to employers. Justice Maupin is correct, but again the Court, including Justice Maupin, overlooked *Mizushima* and *Stevens* and the entitlement of parties to jury instructions which correctly state the legal duty to apply to the facts of the case.

Justice Maupin observed that the statutory language did not add to the standard of recovery Beckwith was required to show, and he therefore concluded the statutory instruction to be harmless error. Justice Maupin overlooked the fact that the incorrect statement of the duty in fact lessened the standard which Beckwith was required to show and that Dillards was prejudiced thereby because the jury was instructed that the mere failure to give Beckwith her job back was a violation of public policy. This is what Beckwith's counsel repeatedly argued, and this is what the trial court assumed the trial

was all about, as Dillards argued extensively in it [sic] Opening Brief, pages 2 through 9. The other eight Justices overlooked Justice Maupin's correct observation that the statute upon which Beckwith so heavily relied applies directly to insurers, not employers. Most importantly, the Court overlooked the fact that other priorities in Subsections 2 through 4 of N.R.S. 616C.530 can properly apply where it is not possible to give the employee the same job back.

In a related misapprehension of fact, the Court states at page 3 of its Opinion that two area sales manager positions were open for which Beckwith was qualified. In fact, the two positions were for *assistant* Sales Area Manager, which are trainee positions for which Beckwith was not eligible because Beckwith had already been trained to be an Area Store Manager. 2 Respondent's Appendix 250. The Court misapprehended that the same type of position was open at the time of her return to work as Beckwith had previously held when, in fact, no such position was open. Because Beckwith had been replaced, the first option under N.R.S. 616C.530 of giving her old job as Area Store Manager back to her was not possible nor was giving her a job as an Area Store Manager in another department for which she was eligible because none was available. 2 Respondent's Appendix 250.

Indeed, Beckwith did not claim that Area Store Manager positions were open; she concedes that the two open positions were for *assistant* Area Store Managers. See Beckwith's Answering Brief, page 11, lines 11 through 13. It was not possible for Dillards to follow Subsection 1 of N.R.S. 616C.530 by giving Beckwith her old job back

without removing her replacement who had been given the job of Area Store Manager during Beckwith's absence.

The Court's misapprehension of this fact is material because the unavailability of Beckwith's prior job under the statute upon which Beckwith relied requires analysis of the other priorities as well. The Court overlooked all other such priorities in its December 13, 1999 Opinion. Similarly, the Court overlooked the standards announced by this Court under *Mizushima* and *Stevens, supra,* concerning parties' entitlement to correct jury instructions concerning legal duty. Dillards was prejudiced by the incorrect jury instruction that it had an absolute obligation to return Beckwith to her prior job because it was no longer available. See Dillards Opening Brief, pages 12 through 14 and Dillards Reply Brief, pages 1 through 8 and pages 32 through 40.

The use of the priority of the return of an employee to work is not intended under the statute to apply in every instance. If it did, the other subsections of the statute, which the Court did not address, would serve no purpose. The Court overlooked the context of the statute in its discussion of Dillards' public policy argument.

The Court similarly overlooked the rest of the statutory scheme which provides for "benefit penalties" under N.R.S. 616A.070 and 616D.120 and the general policy of the workers compensation system which provides employees quick, effective relief from any alleged violations, thereby eliminating the need for such litigation as the instant case. Reply Brief pages: 36 (limitations on *Hanson* [sic] *v. Harris* [sic] by *Falline*), 37 (subsequent

legislative changes and provision for "benefit penalties"); 37 (additional penalties added by the legislature for any noncompliance, including complete decertification under the workers compensation insurance system); and 39 (consideration of the entire workers compensation statutory scheme with respect to claim violations of the public policy insofar as N.R.S. 616C.530(1) states the applicable public policy – as Beckwith argued and as the trial court instructed the jury). Dillards requests rehearing pursuant to N.R.A.P. 40 because the Court overlooked in its December 13, 1999 Opinion, the statutory context of the public policy at issue.

CONCLUSION

Dillards requests the Court to enter an order granting rehearing of this Appeal to consider: 1) Beckwith's admission that she was too busy working on the litigation full-time to be able to take a job and the authorities pertinent thereto on mitigation of damages cited by Dillards; 2) the effects of: *Falline* on emotional distress claims and punitive damages claims in the workers compensation setting; *Shoen's* disallowance of a tortious discharge claim where an alternative statutory remedy exists; and *Filice's* discharge of the employer-principal where the employee-agent is discharged; and 3) the context of the public policy at issue under N.R.S. 616C.530 and all its subparts in the overall workers compensation statutory scheme where the employee is replaced during her absence.

DATED this 3rd date of January, 2000.

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No. 99-1774

IN THE
Supreme Court of the United States

DILLARD DEPARTMENT STORES, INC. AND
DILLARD'S NEVADA, INC.,

Petitioners,

v.

DELORIS BECKWITH,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Nevada

REPLY BRIEF FOR PETITIONER

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Respondent's 30-page opposition barely discusses—and *never defends*—the Nevada Supreme Court's patently unconstitutional "financial annihilation" standard for determining the appropriateness of punitive damages awards, repeatedly misstates the record, and misunderstands this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Respondent, moreover, utterly fails to rebut—and large concedes—Dillard's showing that lower courts are seriously divided over the use of a corporate defendant's wealth to evade or trump *BMW*'s due process standards. This Court should grant review to resolve the conflict over this important and recurring issue of federal law.

A. The "Wealth" Question Is Important And Recurring And Warrants This Court's Review

1. Nowhere in her 30-page opposition does Respondent ever contend that Nevada's "financial annihilation" standard is consistent with this Court's case law. To the contrary, Respondent concedes that this Court requires that a court awarding or reviewing a punitive award "'must be guided by more than just the defendant's net worth.'" Opp. 26 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)); *id.* at 24 (consideration of wealth "has been historically approved by this Court, *provided it is not the sole basis for assessing or upholding an award*) (emphasis added). But Respondent fails to acknowledge that the Nevada Supreme Court, in the face of Dillard's due process claim under *BMW*, affirmed the punitive award in this case based on the State's "general rule" for assessing punitive awards, which relies *solely* upon the defendant's wealth:

> Heretofore, we have recognized the subjective nature of punitive damages and the absence of workable standards by which to evaluate the propriety of such an award. Accordingly, we have allowed that determination to rest with the discretion of the trier of fact *unless the evidence introduced at trial shows that the amount awarded by the jury would financially destroy or annihilate the defendant* in which event we would attempt an appropriate adjustment of the award.

Pet. App. 9a-10a (citations omitted) (emphasis added).

Nevada's deferential and severely limited standard of review is irreconcilable with this Court's precedent, and denies *any* meaningful review of punitive awards, except in the narrow (and in the case of large corporate defendants, essentially non-existent) circumstances where the punishment would financially annihilate the defendant. As this Court explained in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), however, appellate review of the amount of punitive damages awards "has been a safeguard against excessive verdicts for as long as punitive damages have been awarded," and a State's efforts to substantially limit that "well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause." *Id.* at 421, 430. *Honda*, moreover, noted that this Court's prior punitive damages cases—particularly *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), which emphasized the need for meaningful and objective judicial scrutiny of punitive damages awards—had "strongly emphasized the importance of the procedural component of the Due Process Clause." *Id.* at 420-21; *see also Haslip*, 499 U.S. at 18 ("unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities"). Such procedural safeguards are required precisely because "[p]unitive damages pose an acute danger of arbitrary deprivation of property," especially for "large, interstate and multinational corporations." *Honda*, 512 U.S. at 431-35.

Moreover, by tying what limited appellate review is available for punitive awards solely to the defendant's nationwide wealth, the Nevada Supreme Court invites juries to punish defendants based on their lawful economic activity in other States. This Court has repeatedly warned that introduction of evidence of a defendant's wealth may be unfair and unduly prejudicial to large, nonresident corporate defendants, and may raise special due process problems. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) ("[an] emphasis on the wealth of the wrongdoer

increase[s] the risk that the award may [be] influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"); *Honda*, 512 U.S. at 432; ("the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences"). Nevertheless, the courts below endorsed a punitive award that not only was based on such highly prejudicial wealth evidence, *see* Pet. 6-8 (discussing repeated use of inflammatory evidence regarding "corporate jets" and Dillard's position on the Fortune 500 list), but that amounted to nothing other than a punitive tax based on Dillard's lawful activities in other States. Such extraterritorial punishment is plainly unconstitutional. *See BMW*, 517 U.S. at 571-72; *Hunt-Wesson, Inc. v. Franchise Tax Bd.*, __ U.S. __, 120 S. Ct. 1022 (2000) (invalidating California statute that imposed an impermissible tax on income earned outside State's jurisdictional reach).

As Justice O'Connor explained in *TXO*, upholding punitive damages awards where, as here, jury instructions, argument by counsel, and standards of appellate review "invit[e] the jury to redistribute wealth . . . based solely on [a large, corporate defendant's] financial position," 509 U.S. at 489-90 (O'Connor, J., dissenting), "renders the meaningful appellate review contemplated by *Haslip* [and now *BMW*] illusory" and allows courts "to disregard the post-trial review required by due process at whim or will." *Id.* at 500. And, of course, the Nevada Supreme Court's "financial annihilation" standard does not even remotely comply with the constitutional analysis mandated by *BMW*. This Court's review is necessary to restore the due process guarantees that the State of Nevada now denies corporate defendants.[1]

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[1] Respondent's repeated attacks on Dillard's counsel for having recently written a petition for certiorari in another case that presented substantially similar issues as Dillard's petition is bizarre. The fact that an important federal issue

[Footnote continued on next page]

2. Respondent does not, because she cannot, seriously dispute that the lower courts are in conflict over what role a defendant's wealth should play under *BMW*. *See* Pet. 15-20. Rather, Respondent herself concedes that "lower courts may differ in the emphasis they place on a defendant's financial condition," and the most that she can muster in response is the assertion that a "majority of state and federal" courts decide the issue in the way that Respondent deems correct. But, without so much as a single citation, Respondent writes off these clear conflicts as merely a quirk of federalism produced by "the unique history of each state's common law." Opp. 28. As Dillard has demonstrated, however, many courts do not confine their analysis of wealth to the state-law excessiveness inquiry, but rather invoke the defendant's wealth as part and parcel of the *federal constitutional* analysis as a means to trump the three *BMW* guideposts and to uphold punishments that otherwise would be deemed excessive under the Due Process Clause. Pet. 15-20.

The Nevada Supreme Court below, for example, entirely disregarded Dillard's *BMW* due process arguments, and instead upheld the excessive punitive award in this case for the sole reason that that the award "will not financially destroy or annihilate" Dillard. Pet. App. 10a. The Nevada Supreme Court's decision, like the others identified in Dillard's petition that allow a defendant's wealth to trump or evade *BMW*, contradicts numerous decisions from other courts that have squarely rejected wealth as part of the *BMW* due process inquiry. Pet. 16-20.

Nor can Respondent escape the *BMW* Court's rejection of the plaintiff's argument in that case that the defendant's significant wealth saved the $2 million punishment from a finding of excessiveness under the Due Process Clause. *See* Pet. 11-12. Although Respondent argues that state courts have

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recurs in many cases is a compelling reason to *grant* certiorari, not to deny it.

long considered the defendant's wealth in analyzing punitive damage awards under *state* law and that this Court has not held that state courts are constitutionally barred from doing so (Opp. 23-26), that begs the question whether the defendant's wealth is or should be part of the *federal* constitutional calculus, or whether a defendant's wealth can be used to justify an otherwise unconstitutional award. The *BMW* Court, by refusing to include wealth as a guidepost, and by declaring, "[t]he fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business," 517 U.S. at 585, rejected wealth as a due process factor. But many lower courts—like Respondent—have read wealth back into the due process equation, creating conflict and uncertainty and defeating the possibility that defendants will "receive fair notice . . . of the severity of the penalty that a State may impose." *Id.* at 574.

B. The "Wealth" Question Is Squarely Presented By This Case

Respondent's main argument against certiorari is that Dillard's claim that the punitive award violated *BMW* was "neither pressed nor passed upon" in the Nevada Supreme Court, and therefore that the issue of the use of a corporate defendant's wealth to trump or evade this Court's *BMW* due process analysis is not properly presented in this case. Opp. 15-17. But that assertion is simply false.

Both in the trial court and the Nevada Supreme Court, Dillard repeatedly pressed its claim that allowing the jury to base its punitive award on Dillard's lawful income and wealth in other States violated *BMW*'s due process principles, *as even Respondent concedes*. Respondent's opposition acknowledges, as it must, that Dillard argued below "that it was improper *for the jury* to consider a defendant's wealth when assessing punitive damages" (Opp. 27) (emphasis in original), and Respondent concedes that "the Nevada Supreme Court *squarely addressed*" this "'wealth' issue." Opp. 3 (emphasis added). Indeed, the Nevada Supreme

Court's resolution of this important federal claim was to hold that it, like all other challenges to a jury's punitive damages verdict, is irrelevant unless the award would financially destroy the defendant. *See* Pet. App. 9a-10a.

Thus, Respondent, perhaps unwittingly, concedes that the question whether a corporate defendant's nationwide wealth can justify an otherwise excessive punitive award, so long as the award does not financially annihilate the defendant—*the only question presented in Dillard's petition*—is properly presented in this case. *See United States v. Williams*, 504 U.S. 36, 41 (1992) ("pressed or passed upon" rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon"). Respondent nevertheless asserts that this Court should refrain from considering this important federal question because Dillard failed to argue below that the punitive award in this case was actually "excessive" under *BMW*. Respondent, however, is mistaken.

Respondent erroneously asserts that Dillard never argued to the Nevada Supreme Court that the punitive award was "excessive" and only asked that the award be "vacated" because of the improper consideration of Dillard's nationwide wealth under *BMW*. Opp. 12. In its opening brief to the Nevada Supreme Court, however, Dillard argued that in *BMW* "the United States Supreme Court found the punitive damages awarded to be excessive and improperly based upon the defendant's status as an entity doing business nationwide," and that the award in this case plainly violated *BMW*. Appellant's Opening Br. 22; *see also* Appellant's Reply Br. 16 (asserting punitive award "runs afoul of the constitutional parameters established in *BMW*").[2] *BMW*, of course, announces principles and guideposts that determine the maximum punitive award permissible under the Constitution, and

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[2] Twelve copes of all cited briefs to the Nevada Supreme Court have been lodged with the Office of the Clerk of the Court.

therefore a claim that a punitive award violates *BMW* is by definition a claim that the award is "excessive."

In addition, as Respondent herself acknowledged below, Dillard specifically contended that Respondent's repeated reliance on Dillard's nationwide wealth and assets violated *BMW*'s due process standards and "inflam[ed] the jury" into awarding an excessive punishment. Appellant's Opening Br. 22-23; *see also* Respondent's Answering Br. 37 ("Dillard's argues that the district court inflamed the jury by allowing it to consider Dillard's national financial status").

Contrary to Respondent's assertion, moreover, Dillard asked the court to *reduce*—and not just to vacate—the punitive award under *BMW*: "*BMW* limits recoverable punitive damages to considerations of the effects of nationwide businesses and their conduct within the state of Nevada only. The punitive damages awards must be vacated, *or at least substantially reduced*." Appellant's Opening Br. 23 (emphasis added). Similarly, in its reply brief to the Nevada Supreme Court, Dillard argued that its conduct "[was] not comparable to the conduct of th[e] defendants in [other] punitive damages cases"; that "[c]onsideration of Dillard's nationwide sales [was] improper for deterring any 'violation' of' Nevada's workers' compensation laws; that "[t]he rule of *BMW* against deterring out-of-state conduct which violates no public policy requires the Court to vacate Beckwith's Judgment for punitive damages based upon Dillard's national sales"; and that for all these reasons, the punitive award was "*plainly excessive*." Appellant's Reply Br. 14-16 (emphasis added).[3]

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[3] Respondent's quibbles regarding the precise wording of Dillard's due process challenge are insufficient to deny this Court jurisdiction over Dillard's claim. A claim as preserved so long the record shows that "either expressly or by clear intendment," it was "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Dillard's

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Respondent's assertion that Dillard never presented an "excessiveness" argument below is further belied by the fact that the Nevada Supreme Court in fact conducted an excessiveness review of the punitive award—albeit a constitutionally deficient one. In direct response to Dillard's *BMW* argument, the Nevada Supreme Court stated its "general rule concerning the award of excessive punitive damages," namely that any award is permissible so long as it does not financially destroy the defendant. Pet. App. 9a-10a. Applying that "general rule" to this case, the court reasoned that "[t]he award will not financially destroy or annihilate Dillard. Therefore, the punitive damage award is affirmed." *Id.* Thus, the Nevada Supreme Court plainly understood Dillard's argument that the jury's consideration of Dillard's nationwide wealth in awarding punitive damages violated *BMW* as presenting an excessiveness claim, and passed upon that claim in a way that fully presents the import federal question presented in Dillard's petition.

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repeated arguments based on *BMW* easily satisfied that standard. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980) (general "due process" arguments addressed to "the Florida Constitution and its Federal counterpart" provided "sufficient base for this Court's consideration of the federal issue") (citation omitted); *Braniff Airways v Nebraska State Bd.*, 347 U.S. 590, 599 (1954) ("[A]ppellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented."). Moreover, Dillard is entitled to raise any and all arguments in support that of that due process claim in this Court. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

That the Nevada Supreme Court believed that Dillard's federal due process arguments were fully presented and passed upon is also made clear by its issuance of a stay of its mandate to allow Dillard's to give this Court an opportunity to review the important federal question presented in Dillard's petition. As Respondent correctly points out, in seeking the stay, counsel for Dillard in the Nevada Supreme Court presented the court with a copy of the petition for certiorari filed in another case that involved "exactly the same grounds as Dillard's discusses in its Motion for Stay." Opp. 1, Resp. App. 7a. Respondent opposed the stay, arguing that Dillard's *BMW* argument had little chance of success. Response to Appellant's Motion For Stay 2 ("Dillard's fundamental misunderstanding of the *Gore* decision will certainly doom any petition the company files").[4] The Nevada Supreme Court nevertheless exercised its discretion to issue the stay, thereby indicating that it considered the issue fully preserved and capable of review. Stay Order (Mar. 10, 2000) 1a-2a. *Cf. Lanza v. New York*, 370 U.S. 139, 142 n.6 (1962) (state court remittitur order demonstrated federal question had previously been presented and passed upon).

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[4] Notably, Respondent never argued to the Nevada Supreme Court that the *BMW* due process argument was not properly preserved or passed upon. *Id.* In fact, Respondent never raised any procedural arguments against Dillard's due process claim below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

June 13, 2000

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